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# The Restructuring of Legal Education Along Functional Lines

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# The Restructuring of Legal Education Along Functional Lines

WILLIAM K.S. WANG\*

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\* Professor, University of California, Hastings College of the Law. Professors Jayne Barnard and Michael Perlin, my daughter, Karen Wang, and the participants in the February 23–24, 2007 University of San Diego School of Law symposium made valuable comments on earlier drafts. I greatly appreciate the help of my research assistant, Morgan Jackson, and the invaluable cite-checking assistance of Oleksandra Johnson. This article draws on an earlier article, William K.S. Wang, *The Unbundling of Higher Education*, 1975 DUKE L.J. 53.

## ABSTRACT

Currently, law schools tie together five quite distinct services in one package, offered to a limited number of students. These five functions are: (1) impartation of knowledge, (2) counseling/placement, (3) credentialing (awarding grades and degrees), (4) coercion, and (5) club membership. Students do not have the opportunity to pay for just the services they want, or to buy each of the five services from different providers.

This article proposes an “unbundled” system in which the five services presently performed by law schools would be rendered by many different kinds of organizations, each specializing in only one function or an aspect of one function. Unbundling of legal education along functional lines would substantially increase student options and dramatically increase competition and innovation by service providers. This offers the hope of making available more individualized and better instruction and giving students remarkable freedom of choice as to courses, schedules, work-pace, instructional media, place of residence, and site of learning. Most importantly, this improved education would be available on an “open admissions” basis at much lower cost to many more individuals throughout the nation, or even the world.

In order to explain how to restructure the existing law school system, this article will discuss the five educational services presently performed by law schools, the disadvantages of tying these services together, a hypothetical unbundled world of legal education, the advantages of the unbundled system, answers to some possible objections to the system, and some recent developments in the use of technology and distance learning in law schools.

The main theme of this article is the advantage of unbundling. A more modest sub-theme is the benefit of use of technology and distance learning.

“So far as the mere imparting of information is concerned, no university has had any justification for existence since the popularization of printing in the fifteenth century.”

-Alfred North Whitehead.<sup>1</sup>

## I. INTRODUCTION

A major problem confronting law schools today is the rapidly increasing cost to students. From 1992 to 2002, the cost of living in America rose 28%, while the tuition at public law schools increased 134% (for residents) and 100% (for non-residents), and private law school tuition rose 76%.<sup>2</sup> In 2006, the median law school tuition and fees was \$30,670 for a private law school, \$25,562 for a non-resident of the state at a public law school, and \$13,107 for a resident of the state at a public school.<sup>3</sup> According to a 2006 article, the average outlay for resident students at law schools was \$38,000, plus expenses.<sup>4</sup>

In 2002, almost 87% of law students borrowed to pay for their education.<sup>5</sup> During the academic year 2004–2005, the average cumulative amount borrowed for law school by students who borrowed was \$51,056 at public law schools and \$78,763 at private law schools.<sup>6</sup>

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1. ALFRED NORTH WHITEHEAD, *THE AIMS OF EDUCATION* 42 (1963).

2. See ABA COMMISSION ON LOAN REPAYMENT AND FORGIVENESS, *LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE* 10 (2003), available at <http://www.abanet.org/legalservices/sclaid/lrap/downloads/lrapfinalreport.pdf> [hereinafter *LOAN REPAYMENT*]. See also *id.* at 16–17. For a discussion of the increasing costs of higher education, see Richard A. Matasar, *Private Publics, Public Privates: An Essay on Convergence in Higher Education*, 10 U. FLA. J.L. & PUB. POL’Y 5, 10–11 (1998).

3. See <http://www.abanet.org/legaled/statistics/charts/stats%20-%205.pdf>. For additional discussion of the high tuition at law schools, see Edward Rubin, *Should Law Schools Support Faculty Research?*, 17 J. CONTEMP. LEGAL ISSUES 139, 140 nn.4–8 (2008) and accompanying text.

4. See Cameron Stracher, *Law School by Default*, WALL ST. J., June 23, 2006, at W11.

5. See *LOAN REPAYMENT*, *supra* note 2, at 10.

6. See <http://abanet.org/legaled/statistics/charts/averageborrowed.pdf>. See also *LOAN REPAYMENT*, *supra* note 2, at 10 (“In 2002, the [cumulative] amount borrowed by many law students exceeded \$80,000.”). For a table listing the change over time in how many law students are borrowing and how much they are borrowing (for the years 1992–1993, 1995–1996, 1999–2000), see *id.* at 17. For a table listing the ranges of cumulative borrowing by American law student graduates in the class of 1999–2000, with the percentages of students in each borrowing range, see *id.* at 24. A recent newspaper article stated: “Graduates in 2006 of public and private law schools had borrowed an

My solution to these problems is radical. Law schools presently tie together five distinct educational services in one package, offered to a limited number of students. I propose an “unbundled” system in which those five services presently performed by law schools would be rendered on an “open admissions” basis by many different kinds of organizations, each specializing in only one function or an aspect of one function. “Unbundling” would increase quality, significantly decrease costs, and dramatically increase student choice of what instructional media to use, what courses to take, and where and when to take them.

In order to explain how to restructure the existing law school system, this article will discuss the five educational services presently performed by law schools, the rigidities of tying these services together, a hypothetical unbundled world of legal education, the advantages of the unbundled system, answers to some possible objections to the system, and some recent developments in the use of technology and distance learning in law schools.

## II. THE FIVE SERVICES TRADITIONAL LAW SCHOOLS PERFORM

### *A. Description of the Five Functions*

Most students attend a law school principally to earn a degree, but law schools are not just degree-granting institutions. They in fact perform for students five quite distinct services: (1) impartation of knowledge, (2) counseling/placement, (3) credentialing, (4) coercion, and (5) club membership.

***Impartation of Knowledge/Skills/Values.*** A major function performed by law schools is the impartation of knowledge, skills, and possibly values. Rather than use the cumbersome phrase “knowledge/skills/values,” this article shall use the word “knowledge” broadly to include all three.

In American legal education, the live class is the most commonly used method of transmitting knowledge from the instructor to the students, as it has been since the inception of the university in medieval Europe.<sup>7</sup> These classes usually develop around a book purchased by the students.

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average of \$54,509 and \$83,181, up 17% and 18.6%, respectively, from the amount borrowed by 2002 graduates, according to the American Bar Association.” Amir Efrati, *Hard Case: Job Market Wanes for U.S. Lawyers*, WALL ST. J., Sept. 24, 2007, at A1. For a 2002–2006 chart showing the average amount law graduates borrowed, by type of school (public or private), see *id.* See generally Carrie Sturrock, *Students Resort to Private Loans, Staggering Debt*, S.F. CHRON., Oct. 25, 2006, at 1; Robert Tomsho, *As Tuition Soars, Federal Aid to College Students Falls*, WALL ST. J., Oct. 25, 2006, at B1.

7. See generally CHARLES HOMER HASKINS, *THE RISE OF UNIVERSITIES* (1957).

Generally, the text is neither written by the teacher nor published by a company associated with the law school. Seminars, legal writing classes, and clinical courses are also available.<sup>8</sup>

**Counseling/Placement.** Another service is counseling/placement. Members of the faculty and administration advise students on matters such as the selection of courses and specialties and also help students obtain jobs during summers and after graduation.

**Credentialing.** Credentialing services consist of awarding both grades and degrees. To test the proficiency of students, the professor may give written examinations or assign course papers or projects. Students ordinarily receive final grades upon the completion of each semester or quarter of study. Most law schools require a minimal level of cumulative performance for continued enrollment. Students desire this credentialing function because it provides periodic feedback on performance and an achievement record that enhances employment opportunities. The law school completes the credentialing process for a student when the school measures her record against the requirements prescribed for the awarding of the degree.

**Coercion.** A law school creates a crucible in which the professors, the school administration, and peer-group influence all place pressure on the student to perform her work. Some professors call on students at random to encourage preparation for class. By imposing inflexible deadlines, the law school increases the pressures which influence student behavior. Each semester, a student must ordinarily enroll in courses that are worth a minimum number of "credits." If she fails to master the material of a course by the date of the examination, the student receives a failing or poor grade, a blemish on her record. Similarly, if she fails to finish a paper by an assigned deadline, the professor usually lowers the student's grade. In most law schools, after a certain grace period has elapsed, a student may not drop a course without incurring certain penalties. The

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8. For a brief discussion of clinical legal education, see Kevin D. Ashley, *What I Told the Law and Computers Association of Japan About Information Technology in Law School Education*, 62 U. PITT. L. REV. 545, 554–55 (2001); Rubin, *supra* note 3, at 155 n.36 and accompanying text. For citations of sources on clinical legal education, see Joan MacLeod Heminway, *Caught in (or on) the Web: A Review of Course Management Systems for Legal Education*, 16 ALB. L.J. SCI. & TECH. 265, 272 n.25 (2006). For a general discussion of the development of legal education in the United States, including clinical education, see Heminway, *supra*, at 269–89 (including a discussion of the recent use of technology); Stephen M. Johnson, *www.lawschool.edu: Legal Education in the Digital Age*, 2000 WIS. L. REV. 85, 86–89.

school will not refund tuition and will not permit substitution of another course. In some law schools, a student dropping a course after the grace period may receive a failing grade.

Most students are also concerned about being branded a failure in the eyes of others. This influence inspires at least minimal performance.

While these pressures may have undesirable side effects, many students value the coercive features of the law school and would probably be less comfortable with a system that demanded a heavier reliance on their own initiative and motivation.

**Club Membership.** The club membership<sup>9</sup> function has two aspects: (1) exclusiveness and (2) interaction (social as well as intellectual).<sup>10</sup>

Because most law schools accept only a relatively small percentage of those who apply, being accepted is similar to being asked to join a rather exclusive club. Acceptance itself is a form of validation of one's intelligence. If the student attends the school, she will have the opportunity to associate with those of similar intellectual abilities and eventually with those graduates of the school who have distinguished themselves. Both these personal relationships and the fact of attendance at the school itself may mature into opportunities in the job market and professional advancement.

Club membership has a second aspect that does not necessarily depend on the exclusiveness of the school's admission policy: the opportunity for residential law school students to interact with other students. Informally, this might take the form of study groups and intellectual bull sessions. On a more formal level, students may join special interest organizations.

### *B. Some Rigidities of the Bundled System*

Although law schools presently tie together these five educational services, the functions vary in importance and value to different students. A student who wants just one service usually cannot pay just for that. The rigidity and inflexibility of American law school education resulting from this packaging are illustrated by the following examples.

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9. This concept is different from membership in a special-interest student organization. The club described here is composed of the entire student body of a law school.

10. See generally Anthony Lising Antonio, *The Influence of Friendship Groups on Intellectual Self-Confidence and Educational Aspirations in College*, 75 J. HIGHER EDUC. 446 (2004).

- Because of time conflicts, a student may be unable to take a desired course.
- A student may not create her own tri-mester or penta-mester system. She is not able to take one course compressed into a short time period or ten courses simultaneously over a long period.
- A student may not choose the type of examination. If a student decided she really knew the material, she might desire a six-hour test or an intensive oral examination, rather than a simple three or four-hour test; but even if she is willing to pay a higher fee, she is not offered the option of a different kind of examination.

Finally, the student is deterred from varying the knowledge impartation techniques used to prepare for the final examination in a course. Rarely is she allowed to pay a lower tuition and just take the test. Conceivably, students could independently hire tutors, purchase transcripts of lectures at other schools, or buy specially prepared videos (or computerized instruction) on the subjects they were studying; but any expenditures on these items would be in addition to regular tuition. Because the student must pay an extremely high fee for classes even if she does not attend them, she is likely simply to attend classes and not bother with these other possible means of knowledge impartation. In addition, because the professor teaching the live classes drafts the examination, attending the live classes has an advantage.

### III. LEGAL EDUCATION UNBUNDLED

#### *A. Description of an Unbundled System*

Perhaps the best way to convey the disadvantages of tying together the five services would be to describe a hypothetical system in which legal education is restructured along functional lines. An unbundled education industry would contain both profit-oriented and nonprofit firms and institutions. Education would be divided into five industries corresponding to each of the five services presently bundled together by law schools: (1) knowledge impartation, (2) counseling/placement, (3) credentialing, (4) coercion, and (5) clubs.

***Knowledge Impartation Firms.*** The knowledge impartation industry would consist of tutoring firms and of producers, sellers, and renters of books, videos, and computerized instruction. Some book publishing would



operate much as it does today, although possibly with more programmed texts and increased use of photo-offsetting to publish materials for narrow markets. Other book publishers might produce electronic books, with hypertext, searchability, highlightability, annotatability, and other features.<sup>11</sup>

Educational video or computerized instruction production would combine aspects of book publishing and traditional television program production.<sup>12</sup> The videos would be produced competitively by teams of

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11. For a brief discussion of electronic casebooks, see Ashley, *supra* note 8, at 559; Diana R. Donahoe, *Bridging the Digital Divide Between the Law Professor and Law Student*, 5 VA. J.L. & TECH. 13, 74–76 (2000). For a description of the electronic casebooks and other substantive legal books developed at Chicago-Kent Law School, see Richard A. Matasar & Rosemary Shiels, *Electronic Law Students: Repercussions on Legal Education—The Chicago-Kent Law Student's Desktop*, 29 VAL. U. L. REV. 909, 919–26 (1995); Henry H. Perritt, Jr., *The Internet Is Changing the Face of American Law Schools*, 33 IND. L. REV. 253, 266 (1999); Ronald W. Staudt, *In Search of the Origins of the Electronic Casebook*, 1 J.L. SCH. COMPUTING (1999), <http://cnt.kentlaw.edu/jlsc/staudt.html>; Ronald W. Staudt, *Does the Grandmother Come with It? Teaching and Practicing Law in the 21st Century*, 44 CASE W. RES. L. REV. 499, 506–12 (1994) [hereinafter *Grandmother*]; Richard Warner, Stephen D. Sowle & Will Sadler, *Teaching Law with Computers*, 24 RUTGERS COMPUTER & TECH. L.J. 107, 132–39 (1998); Richard Warner, *Teaching Electronically: The Chicago-Kent Experiment*, 20 SEATTLE U. L. REV. 383 (1997). For a discussion of electronic casebooks from the major legal publishers, see Johnson, *supra* note 8, at 94. For a 1998 list of commercially available electronic casebooks, see Warner, Sowle & Sadler, *supra*, at 172–85.

For a discussion of an open access approach to classroom materials in which a professor would be free to utilize, edit, and agglomerate materials as she sees fit, see Matthew T. Bodie, *Open Access in Law Teaching: A New Approach to Legal Education*, 10 LEWIS & CLARK L. REV. 885, 893 (2006). Assuming the copyright problems could be overcome, an open access approach to materials in an unbundled system would enable both students and tutors to create their own individualized “books.” For discussion of the role of tutors in an unbundled system, see *infra* text accompanying note 15.

12. For discussion of the use of information technology to complement or replace what goes on in the law school classroom, see Perritt, *supra* note 11, at 266–73.

For discussion of how the broadband virtual classroom could integrate data, voice, and video, see VAN B. WEIGEL, *DEEP LEARNING FOR A DIGITAL AGE: TECHNOLOGY'S UNTAPPED POTENTIAL TO ENRICH HIGHER EDUCATION* 44–46 (2002).

For an argument that the second communication revolution of the hypertext screen will have as significant an effect on how humans learn as the first communication revolution (the invention of the printing press), see Rogelio Lasso, *From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21st Century Law Students*, 43 SANTA CLARA L. REV. 1, 4–12 (2002).

For a general discussion of how to plan, organize, produce, present, administer, and evaluate a telecourse, see THOMAS E. CYRS WITH EUGENIA D. CONWAY, *TEACHING AT A DISTANCE WITH THE MERGING TECHNOLOGIES: AN INSTRUCTIONAL SYSTEMS APPROACH* (1997).

authorities (both academics and practitioners) writing scripts for simulated demonstrations or classroom situations. Actors and actresses would play the parts of judge, lawyers, and clients or of professor and students.<sup>13</sup>

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For textbooks on distance education, see MICHAEL G. MOORE & GREG KEARSLEY, *DISTANCE EDUCATION: A SYSTEMS VIEW* (2d ed. 2005); MICHAEL SIMONSON, SHARON SMALDINO, MICHAEL ALBRIGHT & SUSAN ZVACEK, *TEACHING AND LEARNING AT A DISTANCE: FOUNDATIONS OF DISTANCE EDUCATION* (3d ed. 2006). For a long list of sources of information on distance education, see MOORE & KEARSLEY, *supra*, at 307–21. For a textbook on online learning, see NADA DABAGH & BRENDA BANNAN-RITLAND, *ONLINE LEARNING: CONCEPTS, STRATEGIES, AND APPLICATION* (2005).

For a discussion of whether the techniques used to reinvent corporations in the 1980s could be used to reinvent colleges and universities in the 1990s, see AMERICAN COUNCIL ON EDUCATION, *CORPORATE LESSONS FOR AMERICAN HIGHER EDUCATION* (1994); *id.* at 31 (“For corporations, restructuring means two things. It means developing or acquiring new business lines. And it means dropping existing products and services—because the corporation provides them inefficiently . . . . In higher education, restructuring might entail introducing new educational technologies . . .”).

13. Cf. John Mayer, *Alternate Futures: The Future of Legal Education*, 1 J.L. SCH. COMPUTING 5 (1999), available at <http://cnt.kentlaw.edu/jlsc/mayer.html> (“A full television studio production facility would be more expensive, but not an entirely unlikely scenario.”); Perritt, *supra* note 11, at 268–69 (“Studio production permits use of technology to do things that are difficult to do in a live classroom, such as quizzes and programmed instruction, scripted presentations, simulations and multimedia techniques such as streaming PowerPoint presentations.”). In 1997, Dean Donald J. Weidner predicted: “More use of technology to cherry-pick faculty from other law schools to perform selected tasks, at low costs. Faculty from other law schools (or adjunct faculty) will be hired to teach using interactive video technology at much lower cost than visiting professors or new faculty members.” Donald J. Weidner, *The Crises of Legal Education: A Wake-Up Call for Faculty*, 47 J. LEGAL EDUC. 92, 100 (1997).

Discussing higher education generally, one commentator suggested the following:

Rather than having each faculty member at an institution assume responsibility for a specific course, consider a modern alternative. Imagine a few dozen scholars with national reputations and expertise in these fields determining and delivering the requisite subject matter material in these courses. Worldclass faculty members (individually or in teams) could present this instructional material in a format both absorbing to watch and enticing to use. State-of-the-art video or computer production studios with a full array of visual and audio effects at their disposal could create such material.

Karen Paulson, *Reconfiguring Faculty Roles for Virtual Settings*, 73 J. HIGHER EDUC. 123, 135 (2002). She also said, “Programmers, instructional developers, and videographers (among others) can translate the subject matter—learned from the faculty member—into instructional materials to take full advantage of pedagogically sound uses of modern technology.” *Id.*

For discussion of the use of laypersons playing the standardized role of a client or witness and interacting with law students followed by an evaluation of the student’s performance, see Lawrence M. Grosberg, *Standardized Clients: A Possible Improvement*

The videos would be pre-tested on students, with the possibility of considering every variable from the instructor's clothes to the number of jokes per hour.<sup>14</sup> The videos could be dubbed into foreign languages for promotion overseas where most nations provide legal education to only a small fraction of their populations. Video or computerized instruction publishers would furnish free programmed guides referring students to other material for further explanation of troublesome points. Videos or computerized instruction would be marketed nationwide in suggested course collections to students, profit-oriented and nonprofit libraries, television broadcasters, cable television companies, and any other firm or organization which cared to purchase or lease them.

Independent organizations would publish advice on how best to intermix the videos, computerized instruction, and books of different firms; and tutors would give advice on what books, videos, and computerized instruction to use. In addition to recommending educational material, tutors would answer individual questions, which would be necessary because even the most sophisticated system of programmed videos and computerized instruction could not completely meet the needs of each student. The tutor/student ratio would depend on student demand.<sup>15</sup>

The tutoring industry would be extremely diverse and decentralized. Some companies would have a large number of tutors and attempt to build up a reputation for consistent excellence. Other tutors would operate in smaller partnerships or as sole practitioners. No particular degree would be a prerequisite. Those tutors who were most talented would presumably command the highest hourly fee.

Some tutors might teach groups of students. Depending on student demand, some tutors or teachers might even give live lectures to large groups, although such lectures would be much less cost effective than video or computerized instruction.

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*for the Bar Exam*, 20 GA. ST. U. L. REV. 841, 842, 851-66 (2004); Lawrence M. Grosberg, *Medical Education Again Provides a Model for Law Schools: The Standardized Patient Becomes the Standardized Client*, 51 J. LEGAL EDUC. 212 (2001).

14. The University of Southern California once had a voluntary workshop designed to make its teachers more interesting. The workshop was run by an actor, director, and a comedy writer-performer, who added jokes to lectures. See Lancaster, *Ever Hear the One About the Professor and the Gag Writer?*, WALL ST. J., Apr. 17, 1974, at 1; *Heeere's the Prof. . .*, TIME, Dec. 2, 1974, at 92.

15. One commentator has speculated: "A live instructor facilitating distance and on-line learning may support many more courses than the 20th Century stand-up lecturer." Steve Sheppard, *The Role of the Professor in the High-Tech Law School*, 1 J.L. SCH. COMPUTING 3 (1999), available at <http://cnt.kentlaw.edu/jlsc/sheppard.html>.

Various innovative methods might eventually become a part of the dynamic, competitive, and profitable knowledge impartation industry.<sup>16</sup> One current example of a knowledge impartation market is bar examination preparation. Private bar examination preparation companies utilize both live and videotaped lectures and sometimes even tutors.<sup>17</sup>

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16. Professor Michael Ariens has described a possible entrepreneurial cyber law school (which still ties credentialing to impartation):

One may attract students by marketing an attractive package of distinguished faculty as lecturers in cyberspace, joined by "teaching assistants" found at the geographic location at which the law school is located. The teaching assistants, like teaching assistants found at most research universities, are present to interact with students in small groups or outside of class, to explain the lectures, to grade examinations and papers, and to modify the lecture content in light of the needs of students at that location (e.g., understanding a particular state law doctrine for bar examination purposes). The distinguished lecturers will prepare computer-based instructional materials that can be modified to suit the needs of students in different locations. The cost of such a program would be substantially less than the cost of current bricks and mortar schools. The entrepreneurial law school would enjoy the distinction of its faculty, and the instructional and student counseling productivity of its teaching assistants.

Michael Ariens, *Law School Branding and the Future of Legal Education*, 34 ST. MARY'S L.J. 301, 360 (2003).

In 1995, Professor Michael Norwood gave a fascinating science-fiction like portrait of the law school of the future. To give just a few scenes, the hypothetical student, "Amy," viewed a televised lecture of a "content" class in a room containing more than 100 students while at the same time more than a thousand students elsewhere were sharing the same experience, including both a Mexican and a Canadian law class. After the "content" class, Amy completed a computer exercise, whose results were sent to her professor (along with those of her fellow students) to provide feedback. Later in the morning, she attended a "context" class taught by a clinician and an upper-class student tutor. In the afternoon, Amy went to a "clinic continuity group meeting" to prepare her for her clinical rotation later in her law school career. See Michael Norwood, *Scenes from the Continuum: Sustaining the MacCrate Report's Vision of Law School Education into the Twenty-First Century*, 30 WAKE FOREST L. REV. 293, 301-05 (1995).

Professor Nicholas Terry has speculated: "Imagine a room (real or virtual) of students with simultaneous access to every other student's notes, outlines, or professorial hypotheticals all being updated in real time." Nicholas P. Terry, *Bricks Plus Bytes: How "Click-and-Brick" Will Define Legal Education Space*, 45 VILL. L. REV. 95, 121 (2001). He has also concluded: "Given the exponential growth of the Internet and its enabling technologies, however, the dismemberment or destruction of traditional service-providing institutions such as law schools has only begun." *Id.* at 139 (citation omitted).

17. For information about one bar preparation company, see [www.barbri.com](http://www.barbri.com). For information about a tutorial program for preparing for the bar examinations of several states, see <http://marinobartutors.com>. For information about a bar review company that

**Counseling/Placement Centers.** Although tutors would provide informal counseling, counseling/placement centers would offer the services of specialists to advise students on important academic decisions and on obtaining jobs. Private placement services already exist for both attorneys and law students.<sup>18</sup>

**Credential Agencies.** Credential agencies would have the functions of test-drafting, test-grading, degree-awarding, paper-grading, and possibly paper-assigning. Each agency would offer multiple-choice and essay final examinations in a myriad of subjects. For students who wanted more frequent evaluation and feedback, credential agencies would offer multiple-choice and essay quizzes and tests on subtopics within a course.

Readers of essay-type examinations would be carefully trained by each credential agency to grade tests consistently and would be provided with manuals to guide them in the grading of each particular question. To encourage consistency, graders would be divided into different levels. Some of the tests graded by the first or lowest-level readers would be randomly selected for regrading by second-level graders, who in turn would have some of their tests selected randomly for a third reading by third-level graders and so on. Each student would be allowed to select one of several grading systems, from a pass-fail grade to a numerical grade of zero to one thousand. With multiple-choice tests, computer programs could provide sophisticated analyses of the student's strengths and weaknesses. Possibly, a student who felt that his test had

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transmits audio lectures over the internet and provides videotaped lectures on CD-ROM, see <http://www.thebarexam.com/illinois/courseinfo.htm>.

For description of a bar review program that uses online lectures to help prepare Australian lawyers for the New York bar examination, see Kellie Harpley, *Australian Lawyers Hit the NY Bar*, LAW. WKLY MAG., Apr. 22, 2005, at 1. See also Kate Gibbs, *Australian Lawyers to Hit NY Bar*, LAW. WKLY MAG., Apr. 16, 2004, at 1 (describing an earlier version of the same bar review course using video lectures, followed by face to face review sessions in New York, to help Australian lawyers prepare for the New York bar).

For information about a one-on-one bar preparation tutoring program that cost \$11,495.00 in 2007, see <http://www.passyourbar.com/private.htm>. For additional discussion of this one-on-one program and of other bar review preparation courses, see Jamie Levy, *Bar Reviews Cash in on Pressure to Pass the Big Test*, CHI. LAW., Aug. 2004, at 27.

18. For the website of one legal recruiting firm that offers private placement services to both law students and inexperienced lawyers, see Legal Authority Web Site, <http://www.legalauthority.com/wwd/index.html> ("We have assisted attorneys and law students from every American law school . . ."). Some large legal placement services, however, do not serve either students or recent law school graduates. See, e.g., BCG Attorney Search website, [http://www.bcgsearch.com/recent\\_grads.html](http://www.bcgsearch.com/recent_grads.html) ("If you are a current law student or a recent graduate with fewer than six months of work experience, we wish you the best of luck in your job search. Unfortunately, BCG Attorney Search will be unable to help you find a position.").

been marked unfairly could pay an extra fee and have her examination regraded. The size of the extra fee would vary with the level of grader requested.<sup>19</sup>

Credential agencies would grade papers on much the same basis as essay examinations. Although some firms might grade essays on certain topics only, other firms would probably be willing to grade any paper for a fee.

A credential agency would award diplomas on the basis of both its own grades and those of other firms.<sup>20</sup> The management of the organization would select the other agencies whose grades it would accept; but once this decision were made, the actual degree-awarding process itself would be quite mechanical, with only a small fee for this service.

Some credential agencies would be state-supported or private nonprofit organizations. Others might be private profit-oriented corporations. The profit-oriented credential agencies naturally would do their best to attract customers. Nevertheless, the most profitable firms should be those with the highest reputation for reliability, integrity, and consistency. As long as an agency had a broad enough range of grades (zero to one thousand, for instance), a prospective employer would not care whether the agency was exclusive as long as its grades were consistent.

One current example of independent credentialing is the bar examination. Candidates do not purchase examination preparation from the agency administering the examination. The Law School Admission Test is another example of an examination sold separately from knowledge impartation.

**Coercion Firms.** Credential agencies with a sufficiently large scale of operations might offer tests in certain subjects as frequently as once a month or even once a week. With freedom to take tests whenever they wished, students would have a tremendous choice of work-pace.

For some students this flexibility in examination scheduling might prove a curse rather than a blessing, but private enterprise should be capable of devising ingenious ways for students to force themselves to work. For instance, a student might deposit cash or a promissory note with a company on the condition that the firm return portions of the funds on a weekly basis if the student performed satisfactorily on a short

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19. The fee for an "appeal" might not be large. Although wealthier individuals might find an "appeal" more affordable, they would have no guarantee that the second grade would be higher.

20. See Terry, *supra* note 16, at 115 ("[I]t is likely that Internet-based consolidators will emerge that will offer J.D. degrees based on contributions from many different schools.").

quiz. If she failed to do so, she would forfeit that part of her money. In effect, the student would receive a weekly salary to do school work. Less wealthy individuals would put smaller amounts of money into escrow, while richer students would deposit larger sums; but the money in jeopardy would be equally valuable to both groups.

A student might also contract in advance for harassment if he or she slacked off in studying. The techniques used by these work-coercers would be similar to those of bill collectors. Coercive services such as these would only be purchased by those students for whom general social and economic pressures were insufficient motivators.

Possibly, some credential agencies would bundle coercion and assessment by offering a combined grade based on both weekly quizzes and a final examination. One question would be whether this bundling increases or decreases the accuracy of the overall grade. Another open question would be the comparability of the grades based on final examinations only with the grades based on the combination of a final examination and weekly quizzes.

***Clubs and Student Communities.*** Because the credential agencies and book, video, and computerized instruction publishers would sell their products and services to anyone, no prestige would attach to patronizing any particular tester or publisher. (There would, however, be value in obtaining high grades, and there might conceivably be some prestige in patronizing certain tutoring firms.)

Communities of students might spring up in various spots in the nation. At these communities, exclusive clubs of students might appear. Individuals would join clubs for (1) the prestige of being a member, (2) social and intellectual interaction with other students whose interests and intelligence were similar, and (3) both before and after graduation, networking with former club members who practice law. Although some entrepreneur might conceivably organize such clubs for profit, most such organizations would probably not be profit-oriented.

Students who felt that exclusive clubs were too snobbish would not be forced to join such clubs to meet or interact with other students. For either free or a small fee, internet “social networking” sites could register a student’s interests and match her with others with similar interests.<sup>21</sup> Blogs would also enable students to cross-fertilize. One

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21. For discussion of new specialized internet “social networking” sites, see Joe Garofoli, *Latest Web Sensation: Specialized Sites for MySpace-Type Interaction*, S.F. CHRON., Mar. 8, 2007, at 1 (“Ning claimed 30,000 social networks by launch day. Four days later, it counted 6,000 more. . . . Companies like Ning are aiming to make it easier for ordinary users to create their own, intimate networks to connect with, say other model railroad enthusiasts, instead of joining a larger network like MySpace.”).

commentator has speculated about the development of nationwide student blogs “puzzling over the intricacies of various legal doctrines . . . . [and] ‘nationwide study groups.’”<sup>22</sup>

Elite law schools currently serve as a filter for prestigious law firms who hire the schools’ graduates.<sup>23</sup> Nationwide subject matter tests with consistent and accurate grades should erode the need for law firms to use this filter.<sup>24</sup>

### *B. Advantages of the Unbundled Educational System*

Restructuring education along functional lines would have many advantages. The most obvious benefit would be the increased student freedom to choose what instructional media to use, what courses to take, and where and when to take them. The unbundled system would enable

22. Bodie, *supra* note 11, at 894.

Some other commentators have suggested variations of unbundling. At a 2000 AALS conference, Professor Michael Froomkin gave a presentation entitled “The Virtual Law School? Or, How the Internet Will De-Skill the Professoriate, and Turn Your Law School into a Conference Center.” The talk described the use of distance learning over the internet with “superstar” teachers and classes of hundreds or even thousands of students. Grading would be outsourced to instructors or independent grading contractors. An independent organization might award degrees. For a summary of the talk, *see* Bodie, *supra* note 11, at 895–97. The PowerPoint slides that accompanied the talk are available at Professor Froomkin’s personal website. *See* Michael Froomkin, *The Virtual Law School? Or, How the Internet Will De-Skill the Professoriate, and Turn Your Law School into a Conference Center* (Jan. 28, 2000), <http://personal.law.miami.edu/%7Efroomkin/articles/aals/index.htm>.

One commentator has suggested that different individuals perform the following five distinct activities presently performed by a single faculty member: (1) designing the course or curriculum, (2) developing the course or curriculum, (3) delivering the subject matter in person or through media, (4) tutoring students, and (5) assessing student learning. *See* Paulson, *supra* note 13, at 125–26.

A task force commissioned by the Department of Health, Education, and Welfare has also recommended unbundling. *See infra* note 130 and accompanying text.

23. *See* Lloyd Cohen, *Comment On the Operation Of The Legal Education Cartel*, 17 J. CONTEMP. LEGAL ISSUES 25, 46 (2008). *Cf.* Rubin, *supra* note 3, 146 (“[T]he medium and large-size law firms that hire the overwhelming majority of graduates from research-oriented law schools, are willing to pay these [high] salaries in order to recruit the students.”).

24. In 1934, Harvard University became the first college to employ the SAT and used it as a means of selecting students both outside the northeast and exclusive prep schools. *See* Zena Woldeyesus, Note, *Don’t Waste Your Time on Another One of Those SAT Review Classes! The Third Circuit’s Skew of the Copyright Laws*, 23 QUINNIPIAC L. REV. 323, 327 (2004).



each student to have her own curriculum and instruction tailored to her special needs.

The flexibility of the new system would be a boon to many individuals who presently have difficulty obtaining a legal education. Poor individuals would find it much easier to earn a law school degree gradually while simultaneously holding a job. Many older men and women who have been frustrated by their lack of law school education also would have the opportunity to study conveniently for a degree.<sup>25</sup> Another important benefit to everyone of the restructured system would be the ease of continuing education throughout one's career.<sup>26</sup>

The restructured system would have still other benefits, one of which would be a decrease in neurotic competition. Without rigid deadlines, education would be less stressful than at present. Students would no longer be forced to undergo the traumatic experience of taking all their examinations in just one or two weeks. A person could take a test whenever she felt she had mastered the material, or she could decide to skip the examination if she had lost interest in a course. If she did poorly on an examination, she could study some more and take the test again a month or so later. The "open admissions" policy of credential agencies also would eliminate the artificial scarcity of student spots in law schools.

Because video and computerized instruction would be produced for a national market, a myriad of courses would be available. Traditional law schools can offer a variety of specialized courses only at considerable expense.

Specialization by function would also improve the quality of education provided. Computerized and video instruction produced by teams of distinguished personnel (with video performances by actors)

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25. See Gerald C. Van Dusen, *The Virtual Campus: Technology and Reform in Higher Education*, ASHE-ERIC HIGHER EDUCATION REPORT Vol. 25, No. 5, 116 (1997) ("The sudden interest in and explosive growth of distance learning can be directly attributed to a pent up demand by older working adults for whom various constraints prevent regular attendance on campus . . . .") (citation omitted). Cf. JAMES A. HALL, ACCESS THROUGH INNOVATION: NEW COLLEGES FOR NEW STUDENTS 165-66 (1991) ("Once upon a time . . . . [s]carcity provided an easy rationale for the university, secure behind its ivory towers, to relegate to a lower academic priority and status those who—because of conditions of age, academic preparation, physical handicap, work obligation, family responsibility, distance, or requirements for mobility—needed to study part-time, or in the evening, or at off-campus locations . . . . But technology offers the promise to overcome scarcity, to open the boundaries of space, time, and cost that previously limited participation in higher education.").

26. For discussion of the usefulness of computer-based lessons in continuing legal education, see *Grandmother*, *supra* note 11, at 526. For a discussion of how e-learning could enhance continuing education generally, see WEIGEL, *supra* note 12, at 134.

might be superior to most present law classroom teaching. The well-developed tutorial and computerized instruction system might furnish an education more individualized than presently available at most law schools.

Similarly, the tutorial and credential agencies would attempt to find and train the best suited individuals with particular talents for assisting or evaluating an individual student's educational progress. Even coercion firms and weekly quizzes could do a more effective job of forcing students to work than the present educational system, which often allows students to procrastinate and to do much of their work at the end of the semester. A further advantage would be the variety of clubs formed, because each student could join those which suited her particular interests.

Not only would the restructured system offer more individualized and better educational services, but it would do so at a much lower cost per student. Most of the high cost of the present law school system buys knowledge impartation. It is an expensive duplication of effort to have similar courses delivered by professors both all over the country and in successive years. Significant economies of scale in legal education are presently not being realized<sup>27</sup> Once the cost of a course were spread over a sizeable portion of the successive law student populations of the nation, the cost per student might be quite low or conceivably even nominal.<sup>28</sup> A legal education could then be made available to all those who desired it.<sup>29</sup> Courses developed in the United States could become available in developing nations.<sup>30</sup>

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27. For a description of the "compelling" economies of scale in the online broadband virtual classroom, see WEIGEL, *supra* note 12, at 45-47 (a tuition rate of \$100 to \$125 per course would be possible). For discussion of the economies of scale in distance education, see MOORE & KEARSLEY, *supra* note 12, at 250-51.

28. For a suggestion that e-commerce might offer a tuition-free legal education, see Terry, *supra* note 16, at 112. For an argument that e-commerce firms may eventually offer a free college education, see WEIGEL, *supra* note 12, at 47-51. *Cf. id.* at 57-59 (describing the saga of Encyclopedia Britannica, which eventually offered the encyclopedia free online). For a 1999 discussion of the saga of Encyclopedia Britannica and its implications for law, law publishing, and the legal profession, see Peter W. Martin, *The Internet: "Full and Unfettered Access" to Law—Some Implications*, 26 N. KY. L. REV. 181, 183-86 (1999).

29. *Cf.* Van Dusen, *supra* note 25, at iii ("[T]hese new century students confront the possibility that a postsecondary educational system designed to manage enrollment growth by weeding out unprepared or uncommitted students may no longer be appropriate or economically defensible.") (quoting William M. Plater, Keynote Address

### C. Answers to Some Possible Objections to the Unbundled System

There are many possible objections to the unbundled system previously described, and this article will attempt brief answers to a few of them.<sup>31</sup>

Some people may fear that a few credential agencies would become too powerful and effectively dictate educational policy throughout the country. For several reasons, this is improbable. Although economies of scale exist with multiple-choice examinations, grading essay examinations

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to the Professional and Organizational Development Network in Higher Education: "Future Work: Faculty Time in the 21st Century" 9 (Oct. 21, 1994)).

30. See Mayer, *supra* note 13, at 13 ("In this future, one law school will offer all of its classes and faculty to law students around the world via the Information Superhighway. Real-time or digitized for later download, full motion video lectures will be delivered whenever the student connects."). See also Peter Cukor & Lee McKnight, *Knowledge Networks, the Internet, and Development*, 25 FLETCHER F. WORLD AFF. 43, 47 (2001) ("[T]here is no doubt that ICT's [information and communication technologies], if properly adopted and implemented, can bring economic and cultural opportunities to developing nations. Education facilities may be greatly improved through distance learning and Internet access."); WEIGEL, *supra* note 12, at 55–56 ("The global market for both higher education and continuing education is immense. . . . As a consequence, global universities will be in position to make a great deal of money."); *id.* at 128–30 (describing how a college or university in a more developed country could establish a presence through a nontraditional campus in one or two locations in the developing world). See generally GLOBAL PERSPECTIVES ON E-LEARNING (Alison A. Carr-Chellman ed., 2005) (discussing e-learning in both developed and developing nations) [hereinafter GLOBAL PERSPECTIVES]; MOORE & KEARSLEY, *supra* note 12, at 257–87 (describing the global span of distance education, including distance education in developing nations); SIMONSON, SMALDINO, ALBRIGHT & ZVACEK, *supra* note 12, at 13–14 (discussing distance education in Turkey, Hong Kong, sub-Saharan Africa, and China); Magdallen Juma, *The African Virtual University (AVU): Challenges and Prospects*, in AFRICA DOT EDU: IT OPPORTUNITIES AND HIGHER EDUCATION IN AFRICA 206 (Maria A. Beebe et al. eds., 2003); Anand Rumajogee, *Distance Education: Issues and Challenges in Sub-Saharan Africa*, in AFRICA DOT EDU: IT OPPORTUNITIES AND HIGHER EDUCATION IN AFRICA, *supra*, at 292. For a general discussion of the use of instructional television in developing nations, see GODWIN C. CHU & WILBUR SCHRAMM, LEARNING FROM TELEVISION: WHAT THE RESEARCH SAYS 73–83 (reprint 2004) (1967).

For a description of an online mental disability law course created by Professor Michael Perlin at New York Law School and offered in Nicaragua in 2002, see Michael L. Perlin, *An Internet-Based Mental Disability Law Program: Implications for Social Change in Nations with Developing Economies*, 30 FORDHAM INT'L L.J. 435, 451–53 & nn.74–78 (2007). (For related discussion see *infra* note 87 and accompanying text.) Chicago-Kent Law School has used distance learning techniques to design practitioner-oriented programs for China. See Perritt, *supra* note 11, at 267.

31. For a summary of the arguments for and against distance learning, see Allison A. Carr-Chellman, *Introduction*, in GLOBAL PERSPECTIVES, *supra* note 30, at 1–12; Allison A. Carr-Chellman, *The New Frontier: Web-Based Education in U.S. Culture*, in GLOBAL PERSPECTIVES, *supra*, at 145–59; Allison A. Carr-Chellman, *Desperate Technologists: Critical Issues in E-Learning and Implications for Higher Education*, 41 J. THOUGHT 95 (2006) [hereinafter *Desperate*].

involves much more limited benefits to size. An agency which graded essay tests might have to double its staff to double its business. In any event, with both multiple-choice and essay examination graders, employers should have the capacity to become familiar with a wide variety of credential agencies—all of which would be honest, reliable, and consistent but each with a different educational viewpoint, just as our society is now able to receive graduates of many law schools. Possibly, firms would appear that specialized in evaluating and comparing credential agencies, thereby enabling relatively small credential agencies to prosper.

Centralization of power in the video and computerized instruction industry is a concern, but at least a fair amount of competition should undermine such centralization. Any entrepreneur could produce and distribute a taped lecture or lecture series without a prohibitive capital outlay.

Some academics may feel that the increased freedom of the unbundled system is not beneficial but harmful because students will choose the wrong courses. Nevertheless, concern about passing the bar examination would always insure that students take certain subjects. In addition, employers would undoubtedly come to their own conclusions about the worth of certain courses, so that economic pressure toward conformity would always exist.

An unbundled system would be driven by the demands of student-consumers (and indirectly by the demands of employers). One concern may be that such a market-driven system would be inferior to traditional law schools in preparing students for the practice of law (the primary goal of legal education). This is not the place for an extended discussion of regulation versus the free-market or of paternalism versus libertarianism. Even in an unbundled educational world, individuals dissatisfied with the way the system operates could attempt to change its course by vigorously entering the market place of ideas with their own books, videos, and educational materials and reviews of such material. Some credential agencies could grant special certificates for completion of certain rigidly defined curricula. Students and employers might value these certificates.

Some persons might criticize the unbundled educational system because it apparently does not encourage research and scholarship by teachers.<sup>32</sup> Also, the number of law reviews would dramatically decline.<sup>33</sup>

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32. Professor Terry has commented: "Pure-play DE [distance education] providers will have a compelling value proposition not only because of the economics of their

This is a definite problem, but the search for knowledge would not be stifled. Tutors and scriptwriters would be forced to do research and scholarship to maintain or improve their teaching and writing ability.<sup>34</sup> Many private and public law schools with substantial endowments could convert themselves into predominantly research institutes and also publish journals. The federal government, state government, and private foundations might also provide grants for research.

One barrier to economies of scale in the unbundled system is the necessity of teaching local law.<sup>35</sup> Tutors or specialized supplementary materials, however, might fulfill this need.

In existing law schools, a few students exercise their right to discuss their examination answers with the professor who drafted and graded the test. In an unbundled world, a student would not be able to do this<sup>36</sup> but would be able to discuss her examination answer with a tutor. As mentioned earlier, in an unbundled system, computer programs could provide sophisticated analyses of a student's strengths and weaknesses

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broadcast model, but because they are not using teaching revenue to subsidize other activities such as faculty research." Terry, *supra* note 16, at 122. See also Cohen, *supra* note 23, at 42 ("If law schools and universities were owned by entrepreneurs concerned with profit maximization there would be little or no market for legal scholarship."); Rubin, *supra* note 3, at 146 ("This is based on the assumption that alternative trainers, such as proprietary schools . . . would not allocate any money for research, with the possible exception of research devoted to discovering more effective ways of teaching.").

For arguments that legal scholarship is not worth the increased tuition that substantially funds its production, see John S. Elson, *The Governmental Maintenance of the Privileges of Legal Academia: A Case Study in Classic Rent-Seeking and a Challenge to Our Democratic Ideology*, 15 ST. JOHN'S J. LEGAL COMMENT. 269, 276–78 (2001). For a sophisticated analysis of the complex nature of the student-tuition subsidy of faculty research, see Rubin, *supra* note 3.

33. For discussion of why law reviews may be obsolete in an internet-based information age, see Terry, *supra* note 16, at 119–20. See also Lawrence B. Solum, *Download While It's Hot: Open Access and Legal Scholarship*, 10 LEWIS & CLARK L. REV. 841 (2006) (discussing the shift of legal scholarship from the old world of law reviews to today's world of peer reviews to tomorrow's world of open access legal blogs). See generally Symposium, *Open Access Publishing and the Future of Legal Scholarship: The Economics of Open Access Publishing*, 10 LEWIS & CLARK L. REV. 733–924 (2006).

34. For discussion of the relation between scholarship and teaching, see Rubin, *supra* note 3, at 145–54 nn.16–34 and accompanying text. For a proposal to reintegrate teaching and scholarship, see *id.* at 162.

35. See Sheppard, *supra* note 15, at 3 ("First is the need to teach local law in local schools. State-owned law schools will be especially unlikely to abandon their classes to multi-state and other national approaches exclusively, although a consortium approach could evolve to provide some of these services.").

36. See Bodie, *supra* note 11, at 897.

on a multiple-choice test.<sup>37</sup> In addition, students would have tremendous choice as to type, length, and time of examination, might be able to request regrading (for a fee) and to appeal a grade (for a fee), and would be able to retake the test at a later regularly scheduled time.<sup>38</sup>

Traditional law schools receive considerable amounts of charitable contributions, especially from alumni. In an unbundled system, attorneys and law firms might instead donate to nonprofit research institutes to fund scholarship and academic journals.<sup>39</sup> In addition, alumni of clubs might donate to their clubs for various purposes, including scholarships. With unbundling, the cost of education might be so low that donor assistance would be much less important.<sup>40</sup>

#### *D. Possible Adaptations of the Unbundled System*

With clinical teaching and with trial advocacy classes, the unbundled system undoubtedly would have to make certain adaptations.<sup>41</sup> Credential agencies could administer practical examinations. In the end, if it proves impossible to unbundle certain forms of specialized instruction, tutors approved by credential agencies could provide this education. The tutors would grade and certify student achievement.<sup>42</sup> Nevertheless, this should be exceptional.

37. See *supra* text accompanying note 19.

38. See *supra* note 19 and accompanying text.

39. As just mentioned, in an unbundled world many private and public law schools with sizeable endowments might convert themselves into predominantly research institutes and publish scholarly journals. See *supra* text accompanying note 34.

40. For discussion of the possibility that the cost of an unbundled legal education might be quite low or conceivably even nominal, see *supra* notes 27–29 and accompanying text.

41. See Johnson, *supra* note 8, at 107 (“It is unlikely, however, that skills courses can be taught in a completely classroom-free manner through computerized simulations or an online course. Skills courses are expensive and effective because they involve low student-faculty ratios.”). See also Sheppard, *supra* note 15, at 3 (“Second is the need to teach particular skills that are hard to automate . . .”).

On the other hand, communications technology can ease the participation of practicing attorneys in clinical legal education. See *Grandmother*, *supra* note 11, at 525–26 (discussing the use of communications technology to enhance the collaboration of practicing lawyers and law schools to create “virtual teaching hospitals” for law schools).

42. Cf. Mayer, *supra* note 13, at 7 (speculating that if online legal education became widespread: “A geographically dispersed mini-consortia could leverage its underutilized buildings and classrooms to provide office space and training to students for the practical portion of their education. Clinics would flourish . . .”). For discussion of how an online law school like Concord could arrange externships and

Other problems with unbundling might prove more intractable. At present, Moot Court and other extracurricular activities provide learning opportunities for students. These activities might not be available in an unbundled system.<sup>43</sup> As mentioned earlier, the number of law reviews would decline.<sup>44</sup> In addition, the institution of tenure might disappear, with the accompanying loss of academic freedom.<sup>45</sup>

Presumably, in an unbundled world the publishers of the online courses would hold the copyright, not the “employee”/teachers involved in the writing of the material.<sup>46</sup> Nevertheless, copyright violations by student-users might be difficult to police or prevent.

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clinic programs, see Robert E. Oliphant, *Will Internet Driven Concord University Law School Revolutionize Traditional Law School Teaching?*, 27 WM. MITCHELL L. REV. 851, 866–68 (2000).

In Professor Michael Norwood’s science-fiction like portrait of the law school of the future, clinical education and a clinical rotation played a large role and supplemented the “content” classes whose televised lectures were viewed simultaneously by more than 1,000 students at various law schools. See Norwood, *supra* note 16, at 302–05.

43. See Johnson, *supra* note 8, at 112. For a brief discussion of moot court competitions for law students, see Ashley, *supra* note 8, at 555.

44. See *supra* note 33 and accompanying text.

45. For discussion of the threat to academic freedom posed by for-profit distance learning, see Risa L. Lieberwitz, *The Corporatization of the University: Distance Learning at the Cost of Academic Freedom?*, 12 B.U. PUB. INT. L.J. 73, 113–22 (2002). See also Carr-Chellman, *Introduction*, in GLOBAL PERSPECTIVES, *supra* note 30, at 10–11; *id.* at 11 (“[H]igher education has always maintained a space for even the most politically incorrect of ideas. Can this continue in the face of online education, tightening budgets, and corporate capitalism’s free reign in our culture?”); *Desperate*, *supra* note 31, at 106 (same). But cf. Larry Alexander, *Academic Freedom*, 77 U. COLO. L. REV. 883 (2006) (arguing that academics today often function not as academics but as political advocates and, when doing so, do not merit academic freedom). See generally Jayne W. Barnard, *Post-Tenure Review as if It Mattered*, 17 J. CONTEMP. LEGAL ISSUES 297 (2008).

46. See Lieberwitz, *supra* note 45, at 121–22.

For discussion of the legal question of the copyright ownership of distance education courses, see SIMONSON, SMALDINO, ALBRIGHT & ZVACEK, *supra* note 12, at 311, 329–32; Michael W. Klein, “Sovereignty of Reason:” *An Approach to Sovereign Immunity and Copyright Ownership of Distance-Education Courses at Public Colleges and Universities*, 34 J.L. & EDUC. 199, 207–09 (2005) [hereinafter *Sovereignty*]; Michael W. Klein, “The Equitable Rule”: *Copyright Ownership of Distance Education Courses*, 31 J.C. & U.L. 143 (2004) [hereinafter *Copyright Ownership*]. See generally Todd A. Borow, *Copyright Ownership of Scholarly Works Created by University Faculty and Posted on School-Provided Web Pages*, 7 U. MIAMI BUS. L. REV. 149 (1998); Georgia Holmes & Daniel A. Levin, *Who Owns Course Materials Prepared by a Teacher or Professor? The Application of Copyright Law to Teaching Materials in an Internet Age*, 2000 BYU EDUC. & L.J. 165 (2000). For discussion of the policy question of whether the university or faculty members should own online courses, see *Desperate*, *supra* note 31, at 107–08.

Also, the impersonal nature of the credentialing system might conceivably encourage cheating. Careful proctoring and vigilance could be used to deter dishonesty.<sup>47</sup>

### *E. Concern About the Quality of the Unbundled System*

Ultimately, the most important concern is the quality of education produced by the unbundled system. Defenders of present law school tying arrangements will undoubtedly assert that video or computerized instruction is not as effective as live law professors.<sup>48</sup> Unfortunately, little empirical research exists on this question.<sup>49</sup>

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For discussion of other copyright issues raised by distance education, see DABBAGH & BANNAN-RITLAND, *supra* note 12, at 56–62; MOORE & KEARSLEY, *supra* note 12, at 206; SIMONSON, SMALDINO, ALBRIGHT & ZVACEK, *supra* note 12, at 293–316.

47. For discussion of how Concord University Law School deals with the possible problem of cheating, see Oliphant, *supra* note 42, at 859–60. For discussion of the problem of examination and test security in distance learning, see MOORE & KEARSLEY, *supra* note 12, at 155. For discussion of the problem of academic misconduct in distance education and how to deter it, see SIMONSON, SMALDINO, ALBRIGHT & ZVACEK, *supra* note 12, at 282–85. See generally Jane Genova, *Cheating in Graduate School*, GREENTREE GAZETTE, Jan. 2007, at 58 (“According to a recent survey conducted at 32 graduate schools, 47 percent of students admitted to cheating during that year. For graduate business students, the percentage was 56.”); Donald L. McCabe, Linda K. Trevino & Kenneth D. Butterfield, *Dishonesty in Academic Environments: The Influence of Peer Reporting Requirements*, 72 J. HIGHER EDUC. 29 (2001); *id.* at 29 (“Surveys of cheating among college students suggests that academic dishonesty is both prevalent and growing.” (citations omitted)); Donald L. McCabe, Linda K. Trevino & Kenneth D. Butterfield, *Academic Integrity in Honor Code and Non-Honor Code Environments*, 70 J. HIGHER EDUC. 211 (1999); Donald L. McCabe & Linda Klebe Trevino, *Academic Dishonesty: Honor Codes and Other Contextual Influences*, 64 J. HIGHER EDUC. 522 (1993).

48. For the description of a speech by Justice Ruth Bader Ginsburg questioning internet-only law schools, see Katherine S. Magnan, *Justice Ginsburg Questions Internet-Only Law School*, CHRON. HIGHER EDUC., Sept. 24, 1999, at A36, available at <http://www.Chronicle.com/free/99/09/99091302t.htm>. For a collection of internet chat comments on Justice Ginsburg’s speech, see <http://jurist.law.pitt.edu/colloq1.htm>. For comments about the possibly dehumanizing effect of computer and e-mail communication in legal education, see Robert H. Thomas, “Hey, Did You Get My E-Mail?” *Reflections of a Retro-Grouch in the Computer Age of Legal Education*, 44 J. LEGAL EDUC. 233 (1994).

For a summary of some of the skeptics about the quality of e-learning, see *Desperate*, *supra* note 31, at 103–07, 108–12. For a summary of the arguments for and against distance learning, see sources cited *supra* note 31.

Although Professor Ronald W. Staudt is an enthusiastic proponent of the use of technology in legal education, he has commented: “While some of the humanity of teaching can be replicated on the network with multimedia or virtual reality, I am convinced



For higher education generally, some studies indicate that online or CD-Rom education is as effective as live classroom teaching.<sup>50</sup> At least

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that some components of teaching . . . require face to face meetings. However, I have not yet identified the precise components.” *Grandmother*, *supra* note 11, at 522.

49. See Marie S. Newman, *Not the Evil TWEN: How Online Course Management Software Supports Non-Linear Learning in Law Schools*, 5 J. HIGH TECH. L. 183, 195 (2005) (“Unfortunately, only a few small-scale studies and anecdotal evidence support this assertion [that students learn more when technology is introduced into the law school curriculum].”); *id.* at 195–96 (reviewing and summarizing the small-scale studies and anecdotal evidence); *id.* at 196 (“There has been no formal, large-scale empirical study to gauge the effect of technology on students who are entering law school in the twenty-first century.”). Cf. Lasso, *supra* note 12, at 47–48 (“There is increasing empirical evidence that the use of technology enhances law students’ learning.” *Id.* at 47; citing three articles: David J. Maume, Jr. & Ronald W. Staudt, *Computer Use and Success in the First Year of Law School*, 37 J. LEGAL EDUC. 388, 359 (1987); Paul F. Teich, *How Effective Is Computer-Assisted Instruction? An Evaluation for Legal Educators*, 41 J. LEGAL EDUC. 489, 490 (1991) (discussed *infra* note 50); Richard Warner, *Teaching Electronically: The Chicago-Kent Experiment*, 20 PUGET SOUND L. REV. 383, 110–12 (1997); but also noting: “There has been, however, no empirical study to determine the effect technology has on the learning of students who are just now entering law school.” Lasso, *supra* note 12, at 48).

For an early experiment comparing an introductory survey course on Telecommunications Law using traditional teaching methods and an Advanced Telecommunications Law course using a combination of live in-class lectures, the internet, videotapes, videoconferencing, and an electronic casebook, see Andrea L. Johnson, *Distance Learning and Technology in Legal Education: A 21st Century Experiment*, 7 ALB. L.J. SCI. & TECH. 213 (1997). In responses to student questionnaires, the “students generally agreed . . . that live class instruction was not essential for effective learning in law school.” *Id.* at 219.

50. See CYRS & CONWAY, *supra* note 12, at 5 (“Computer-based conferencing has been found to be as effective as traditional teaching. Students learned as much and as well.”; citing T.J. Deloughry, *Remote Instruction Using Computers Found as Effective as Classroom Sessions*, CHRON. HIGHER EDUC., Apr. 20, 1988, at A15, A21); MOORE & KEARSLEY, *supra* note 12, at 240–41 (describing studies showing no difference between traditional teaching and online learning). For an example of such a study, see Peter Navarro & Judy Shoemaker, *Performance and Perception of Distance Learners in Cyberspace*, 14 AM. J. DISTANCE EDUC. 15 (2000) (studying several hundred undergraduate students taking an introductory economics course at the University of California; results suggested that cyberlearners learned as well as, or better than, traditional learners regardless of such attributes as gender, ethnicity, academic background, computer skills, and academic background, and that cyberlearners had a high degree of satisfaction; cyberlearners regarded as the most essential and most enjoyable the CD-Rom lectures that simulated the traditional classroom).

For a 2006 summary of the research on the effectiveness of online education, see *Desperate*, *supra* note 31, at 98–99. The author notes that many studies show that online education produces equivalent or superior results to traditional face to face instruction, but says that the comparison studies may not be valid and reliable. See *id.* For additional discussion of research on online learning, see DABBAGH & BANNAN-RITLAND, *supra* note 12, at 68–107. For discussion of research on web-based instruction, see *id.* at 92–103.

at the college level, empirical research also shows that personal instruction is not superior to instructional television. In 1966, a review of 202 published studies comparing instructional television and conventional teaching (at the college level) indicated that there was probably no significant difference; 152 (75%) showed no significant difference; twenty-two (11%) found television instruction to be superior; and twenty-eight (14%) showed conventional instruction to be better.<sup>51</sup> In 1969, after analyzing the actual data contained in forty-two comparative studies in which a total of 348 comparisons of final examination results had been made, two experts commented: "The conclusions of our comparative analysis are unequivocal . . . . In the most intensive analysis across many studies yet made, we can find no evidence to dispute the conclusion that one-way television is as good as other college instructional media."<sup>52</sup> A 1997 review of the research concluded: "The findings are

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In 1999, one commentator said: "Those who study technology's role in education (not legal education per se; but rather education generally) readily acknowledge that no one really knows whether the technology deployed in today's classrooms help[s] students learn better or more." Michael Heise, *Closing One Gap but Opening Another?: A Response to Dean Perritt and Comments on the Internet, Law Schools, and Legal Education*, 33 IND. L. REV. 275, 287 (1999) (citation omitted).

For a 1991 summary of the research on the effectiveness of computer-assisted instruction in college and university courses, see Teich, *supra* note 49. Among his conclusions are the following. Such instruction may improve learning while significantly reducing the time needed for instruction. Furthermore, students like computer-assisted learning and may even prefer it to traditional teaching. Finally, some limited evidence exists that computer-assisted instruction is most effective when used in conjunction with conventional teaching rather than as a substitute. *See id.* at 490.

For description of a project at thirty colleges and universities that achieved more learning at lower cost by redesigning large introductory college lecture courses with online access to web-based tutorials, on-demand feedback, and support from student peer mentors, *see infra* note 128 and accompanying text.

For a 1983 summary of the research on the effectiveness of computer-assisted instruction in primary, secondary, and higher education, see Robert Charles Clark, *The Rationale for Computer-Aided Instruction*, 33 J. LEGAL. EDUC. 459, 467-68 (1983). Professor Clark drew the modest conclusion that no reason exists to abandon theoretical enthusiasm for computer-assisted instruction and that some aspects of the empirical research are encouraging. *See id.* at 468.

For an editorial-like essay criticizing online education and "efficiency" in higher education, see Michael Berube, *Why Inefficiency Is Good for Universities*, CHRON. HIGHER EDUC., Mar. 27, 1998, at B4, available at <http://www.uwofa.ca/articles/ineff.html>.

51. *See* CHU & SCHRAMM, *supra* note 30, at 7.

52. ROBERT DUBIN & R. ALAN HEDLEY, *THE MEDIUM MAY BE RELATED TO THE MESSAGE-COLLEGE INSTRUCTION BY TV* 1-2 (1969).

consistent over the years: There is no significant difference in learning outcomes between traditional and televised instruction, live or videotaped. Television does not affect the quality of instruction.”<sup>53</sup> More recent reviews of the literature come to similar conclusions.<sup>54</sup>

The College Level Examination Program (CLEP) of the College Entrance Examination Board allows students to demonstrate proficiency by examination in various subjects no matter how this knowledge was acquired. A number of studies have compared regular university students who earn some credit through CLEP examinations with students who take no CLEP examinations. After reviewing these studies, three commentators (Ewald Nyquist, Jack Arbolino, and Gene Hawes) conclude:

[E]xternal learning that is properly validated by examinations appears to be just as effective for intellectual development as learning done in regular course attendance. People who have thus learned externally, in crucial comparisons with fellow students who are also actually in college, apparently have learned effectively because they get higher course marks in general than their fellow students. And crucial analyses of later conventional course work by such external learners indicates the effectiveness of their external learning because they also generally get better marks in that advanced course work than their fellow students who have learned only in conventional course attendance.<sup>55</sup>

Empirical research even questions the superiority of lecture and/or discussion over independent study. In 1968, a major investigation pooled the data from a large number of studies conducted between 1924

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53. CYRS & CONWAY, *supra* note 12, at 3.

54. For a 2006 review of the research comparing traditional and distance learning (mostly telecourses), see SIMONSON, SMALDINO, ALBRIGHT & ZVACEK, *supra* note 12, at 64–66, 73–76, 340; *id.* at 66 (“[A] safe conclusion is that distance and local learners will achieve at the same level . . . . In other words, distance is not a predictor of learning. It is safe to say that learning at a distance is not a predictor of learning.”); *id.* at 76 (“[R]esearch comparing different amounts of interaction showed that interaction had little effect on achievement.”). For a 2005 review of the studies comparing conventional teaching with distance learning (telecourses, online courses, etc.), see MOORE & KEARSLEY, *supra* note 12, at 240–42; *id.* at 242:

[I]t should be obvious that there is little point in gathering data to see if distance education courses can be as effective as conventional classroom instruction. The evidence already shows that (1) instruction at a distance can be as effective in bringing about learning as classroom instruction, and (2) the absence of face-to-face contact is not in itself detrimental to the learning process.

Similarly, a 2000 review of the literature comparing the performance of traditional learners and distance learners (mostly telecourses) stated: “The broad consensus among these performance studies is that there appears to be ‘no significant difference’ in learner achievement between the two modes.” Navarro & Shoemaker, *supra* note 50, at 17.

55. EWALD B. NYQUIST, JACK N. ARBOLINO & GENE R. HAWES, COLLEGE LEARNING ANYTIME, ANYWHERE: NEW WAYS FOR ANYONE TO GET COLLEGE COURSE CREDITS AND COLLEGE DEGREES BY OFF-CAMPUS STUDY AND EXAMINATIONS 157 (1977).

and 1965 on the relationship between achievement and instructional arrangements. The study showed that there was no discernible difference between lecture and discussion, between lecture and lecture-discussion, between supervised independent study and face to face instruction, between supervised independent study and lecture, between supervised independent study and discussion, between supervised independent study and lecture-discussion, between supervised and unsupervised independent study, and even *between unsupervised independent study and face to face instruction*. Under the subtitle “In a Word—Nothing,” the authors conclude: “These data demonstrate clearly and unequivocally that there is no measurable difference among truly distinctive methods of college instruction when evaluated by student performance on final examinations.”<sup>56</sup>

Several large-scale studies not included in the above pooling analysis generated similar conclusions. Experiments at Antioch College<sup>57</sup> and the University of Colorado showed that drastic reductions in class time had no adverse effect on content understanding.<sup>58</sup>

With a grant from the Fund for the Advancement of Education, Miami University in Ohio performed an extensive experimental study in instructional procedures in 1956–1959.<sup>59</sup> The major purpose of the project was to determine the relative effectiveness of small and large group instruction at the college level.<sup>60</sup> Using various measures of performance, including papers, essay examinations, and multiple-choice tests, the study compared the performance of “large” (generally more than 80 students) with “small” classes (generally 25–35 students) with many variations—television, independent study, graduate-student taught

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56. ROBERT DUBIN & THOMAS C. TAVEGGIA, *THE TEACHING-LEARNING PARADOX—A COMPARATIVE ANALYSIS OF COLLEGE TEACHING METHODS* 35 (1968). *But cf.* Susan E. Davis, *Who Needs Law School?*, CAL. LAW., Feb. 2007, at 12 (in 2006, only one of the five Law Office Study Program (LOSP) students taking the California bar passed; between 1980 and 2004, only 64 attorneys had gotten their legal training and then passed the California bar, out of 436 students who registered for the LOSP; in 2005, only two out of New York’s fifteen LOSP students passed the bar, and not one of Vermont’s five LOSP students did).

57. *See* ANTIOCH COLLEGE, *EXPERIMENT IN INDEPENDENT STUDY, 1957–1958* (1958).

58. *See* HOWARD E. GRUBER & MORRIS WEITMAN, *SELF-DIRECTED STUDY: EXPERIMENTS IN HIGHER EDUCATION passim* (1962).

59. *See* F. GLENN MACOMBER & LAURENCE SIEGEL, *FINAL REPORT OF THE EXPERIMENTAL STUDY IN INSTRUCTIONAL PROCEDURES* (1960).

60. *See id.* at 7.

live sections, and instructor-taught live classes.<sup>61</sup> Among the conclusions were the following:

[W]ith few exceptions [going both ways], large group instruction (including TV) was as effective as was small group (conventional) instruction. . . . Achievement defined as the ability to solve problems and to synthesize information was investigated in a number of large (including TV) classes and equated control sections. The results support the general conclusion that the experimental procedures did not lead to reduced proficiency in these areas. . . . The evidence obtained did not support a differential level of achievement for high ability students in the experimental and control sections of . . . [a widespread sampling of] courses. Similarly, low ability students achieved as well regardless of their assignment to the experimental or to the control sections of these courses.<sup>62</sup>

In the words of one commentator, Ohmer Milton:

Consistently, . . . such variables as class size, frequency of class meetings, and manner of presentation [including independent study], when considered in isolation, have been demonstrated to wield no major impact upon learning as measured by the usual tests. Even when some of these variables have been combined, their influence appears to be quite minimal. . . .

. . . Because of the consistency of the results in different institutions of higher learning—for example *selective and non-selective ones*—and the disciplines in and among them, a far-reaching conclusion, and one which undoubtedly is disturbing to many faculty members and students, can be drawn about the teaching of subject matter content: *If the content of a discipline can be defined as a body of information and concepts, the way or ways in which ideas or concepts are organized, and the methods by which knowledge is sought, and if it is acceded that class examinations measure content primarily—there being no research evidence to the contrary—then the explanations of such content by the instructor in the classroom, by whatever method, contribute little to the learning of content.*<sup>63</sup>

In summary, the possible objections to the unbundled system are not persuasive.<sup>64</sup> In light of the research on learning, the case for unbundling is

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61. See *id.* at 10–12.

62. *Id.* at 6.

63. OHMER MILTON, *ALTERNATIVES TO THE TRADITIONAL: HOW PROFESSORS TEACH AND HOW STUDENTS LEARN* 23–24 (1972) (emphasis added).

64. *Contra* Johnson, *supra* note 8, at 104–13 (arguing that classroom-free legal instruction would have many disadvantages, including (1) inability of professors to provide recommendations for students, (2) lack of law review, moot court, and extracurricular activities, (3) less effective career services, librarian services, skills training, teaching of professionalism and values, use of the Socratic method, group learning, active learning, and contextual learning, and (4) fewer faculty members to advise students and answer their questions). Professor Johnson, however, acknowledges that distance learning might enable moving from a three-year residency to a two-year residency requirement for the J.D. See *id.* at 123. He also acknowledges that virtual LL.M. programs are quite feasible. See *id.* In addition, he notes that distance education

overpowering. Students should at least be given the option of purchasing less expensive media of instruction free from the restraints of anti-competitive educational tying arrangements.

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would allow law faculty members to educate the general public about the law and their legal rights for free or at very low cost. *See id.* at 124–26.

For another criticism of virtual law courses, see Bodie, *supra* note 11, at 897:

But such a course would have even less feedback than the traditional law school course, which provides in-class feedback through the Socratic method. Moreover, there would be no stopping by to chat after class, no office hours, no human interaction. Perhaps law schools could manage discussion boards or email interactions by outsourcing such responsibilities to adjuncts or teaching assistants, but the quality of the feedback would not be the same. Feedback on exams would be less instructive as well; mass production of grading would presumably hurt quality, and there would be no opportunity to meet with the professor to go over the exam.

For an attempt to answer Professor Bodie's point about meeting with the professor to go over the examination, see *supra* text accompanying notes 36–38.

Another question is the extent to which law schools are run for the benefit of faculty members at the cost of teaching. For a description of how teaching students can suffer when faculty self-interest governs, see Richard A. Matasar, *Defining our Responsibilities: Being an Academic Fiduciary*, 17 J. CONTEMP. LEGAL ISSUES 67, 69–71 nn.3–5 (2008); *id.* at 71 (footnotes omitted):

First, course offerings are tilted to what faculty members want to teach, not to what students need . . . . Second, courses are offered at times that best suit faculty schedules, not those of students. Third, evaluation of students is minimized . . . . Fourth, it promotes absence from campus in order to do scholarship, attend conferences, or participate in activities considered more important work than dealing with students. . . .

*Cf.* Clayton P. Gillette, *Law School Faculty as Free Agents*, 17 J. CONTEMP. LEGAL ISSUES 213, 230 (2008) (“[T]hose [faculty members] who wish to exploit free agency will invest more time in visible scholarship that is highly valued by the hiring school, and less time in improving low visibility institutional service or teaching that is undervalued by the hiring faculty. This tendency simply reinforces the incentives that faculty members would otherwise have in a world of free agency.”); Rubin, *supra* note 3, at 142 (“[V]irtually all the material reward that tenured faculty members receive, other than basic job security, depend on their research production.”); *id.* at 164 (“[i]n contrast, teaching is generally left to the faculty member’s personal sense of responsibility”). Unbundling would move legal education from faculty sovereignty to consumer sovereignty.

*F. Some Recent Developments in the Use of Technology and  
Distance Learning in Law Schools*

Standard 304(b), “Academic Standards and Achievements” of the “Standards for Approval of Law Schools” of the American Bar Association (ABA) provides:

A law school shall require, as a condition for graduation, successful completion of a course of study *in residence* of not fewer than 58,000 minutes of instruction time, except as otherwise provided. *At least 45,000 of the minutes shall be by attendance in regularly scheduled class sessions at the law school.*<sup>65</sup>

This and other ABA standards preclude an ABA accredited law school from completely unbundling instruction and examinations and offering examinations only.<sup>66</sup> Most states require students to graduate from an ABA accredited law school before taking the bar examination.<sup>67</sup> Moreover, federally subsidized loans are available only to students who attend ABA accredited law schools.<sup>68</sup>

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65. STANDARDS FOR APPROVAL OF LAW SCHOOLS STANDARD 304(b) (2006–2007) (emphasis added), *available at* <http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Chapter%203.pdf> [hereinafter ABA STANDARDS].

66. For discussion of various ABA standards that preclude a “virtual” distance education law school (such as ABA residence requirements and ABA rules about physical plant and library resources), see Terry, *supra* note 16, at 102. For discussion of various ABA standards that impede the expanded use of technology in legal education (such as ABA standards regarding libraries, physical plant, branch campuses, distance education, faculty, and minimum number of semesters), see Johnson, *supra* note 8, at 115–17.

For criticism of the ABA standards as maintaining a “rent-seeking” cartel that limits competition in the legal services market and creates an overly costly legal education system, see Elson, *supra* note 32. For similar criticism, see George B. Shepard & William G. Shepard, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091 (1998). See also Cohen, *supra* note 23, at 27–28 nn.1–3 and accompanying text (discussing the ABA cartel which (1) uses law schools as a barrier to entry to the legal profession, (2) limits the entry of competing law schools, and (3) limits the services provided to law students); Oliphant, *supra* note 42, at 875–76 (citing and quoting Shepard & Shepard, *supra*). For discussion of the ABA standards and a public interest defense of some, but not all of them, see Steven R. Smith, *Gresham’s Law in Legal Education*, 17 J. CONTEMP. LEGAL ISSUES 171, 178 (2008).

67. See Johnson, *supra* note 8, at 115; Terry, *supra* note 16, at 101–02. Cf. Molly McDonough, *See You in 18 Months: Education Department Puts ABA Accreditation Role on a “Short Leash,”* A.B.A. J., Feb. 2007, at 64, 65 (“The ABA now accredits 195 law schools, 180 of which rely on their accreditation for their students to sit for the bar in their respective states. Seventeen law schools are freestanding institutions that use ABA accreditation as a basis for receiving federal funding from the Education Department.”).

68. See Johnson, *supra* note 8, at 115.

Nevertheless, in 2002, the American Bar Association amended its law school accreditation standards to allow students to take up to twelve hours of distance learning courses over the internet or other means of electronic delivery, including closed-circuit television.<sup>69</sup> None of these hours may be in the first year (the first 28 credit hours), and no more than four credits may be in one semester.<sup>70</sup> The distance education course must have both “ample interaction with the instructor and other students both inside and outside the formal structure of the course throughout its duration; and . . . ample monitoring of student effort and accomplishment as the course progresses.”<sup>71</sup>

Interpretation 306-3 states that a course that consists of two thirds or more of regular classroom instruction will not be treated as a “distance education” course.<sup>72</sup> This means that the ABA Standards set no limit on the number of law school courses that have a distance education component of one third or less.

The main theme of this article is the advantage of unbundling. A more modest sub-theme is the benefit of use of technology and distance learning. Many law schools have experimented with partially or completely eliminating the live classroom component of a course.<sup>73</sup> An excellent published bibliography summarizes and categorizes articles describing the use of technology in legal education.<sup>74</sup> These articles describe many

69. See Martha Neil, *High Marks: Members of Online Law School's First Graduating Class Are Off to a Good Start*, A.B.A. J., July 2004, at 14, 14. The relevant standard is Standard 306 “Distance Education.” See ABA STANDARDS, *supra* note 65, Standard 306. For discussion of Standard 306, see Paula Berg, *Using Distance Learning to Enhance Cross-Listed Interdisciplinary Law Courses*, 29 RUTGERS COMPUTER & TECH. L.J. 33, 50–52 (2003).

70. See ABA STANDARDS, *supra* note 65, Standard 306(d), (e).

71. *Id.*, Standard 306 (c).

72. See *id.*, Interpretation 306-3.

73. In a 2003 ABA law school curriculum survey, of the 153 schools responding, 82 offered real-time distance education courses during the 2003–2004 academic year as compared with 49 in the 2002–2003. See Daniel C. Powell, *Five Recommendations to Law Schools Offering Legal Instruction Over the Internet 2* (Univ. of Ala., Pub. Law Research Paper No. 922767, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=922767](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=922767).

74. See Pearl Goldman, *Legal Education and Technology: An Annotated Bibliography*, 93 LAW LIBR. J. 423 (2001). The bibliography is divided into the following major topics: “Specific Technologies,” “Curriculum,” “Distance Education,” “Pedagogical Effectiveness,” “Law Schools,” “The Future of Technology in Legal Education,” and “Miscellaneous.” Some of the major topics are divided into subtopics. An author index is at the end. This bibliography is invaluable for anyone interested in the area.



of legal education's experiments and innovations with both technology and distance education.<sup>75</sup> This article will describe only a few examples.

Some U.S. and foreign law schools have formed a consortium to explore the possible exchange of distance learning opportunities.<sup>76</sup> A professor of one school who is the author of a casebook might offer a distance learning course to students at another school in the network.<sup>77</sup>

Chicago-Kent University Law School has used information and computer technology to teach law.<sup>78</sup> The school has evaluated and experimented with "distance learning technology, including e-mail, discussion groups, chat rooms, streaming video and audio, video conferencing and computer white board tools."<sup>79</sup>

New York Law School currently offers five internet-based mental disability law courses,<sup>80</sup> with four more scheduled for the 2007-2008

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75. See *id.*

For discussion of the use of internet course management systems for legal education, see Heminway, *supra* note 8.

For a suggestion that law students create an internal class-based wiki to teach to and learn from each other, see Beth Simone Noveck, *Wikipedia and the Future of Legal Education*, 57 J. LEGAL EDUC. 3 (2007).

For commentary on law professor use of discussion boards and class blogs, see Bodie, *supra* note 11, at 893-94.

For a 1997 article describing the evolving use of the computer in legal education and future possibilities, see Michael A. Geist, *Where Can You Go Today?: The Computerization of Legal Education from Workbooks to the Web*, 11 HARV. J. L. & TECH. 141 (1997).

For discussion of the pressures for increasing use of distance education in law schools, see Diana L. Gleason, *Distance Education in Law School: The Train Has Left the Station* (bepress Legal Series, Working Paper No. 1762, 2006), available at <http://law.bepress.com/expresso/eps/1762> ((1) today's students expect more, including active learning, feedback, use of technology, and continuous electronic access to materials and services; (2) the growing number of non-traditional students who have difficulty leaving homes or jobs; and (3) the increasing debt burden on law students).

76. See Neil, *supra* note 69, at 15.

77. See *id.*

78. For discussion of plans at Chicago-Kent Law School to implement and test the effectiveness of distance learning in some courses, see Perritt, *supra* note 11, at 271-73. For a description of the electronic casebooks and other substantive legal books developed at Chicago-Kent Law School, see sources cited *supra* note 11. For a 1998 article drawing on the Chicago-Kent experience to discuss teaching law with computers, see Warner, Sowle & Sadler, *supra* note 11.

79. Perritt, *supra* note 11, at 272.

80. See Perlin, *supra* note 30, at 444-45 & n.42 (citing <http://www.nyls.edu/pages/167.asp>). For additional discussion of New York Law School's online courses on disability law, see Michael L. Perlin, "Ain't No Goin' Back": *Teaching Mental Disability Courses Online*, 51 N.Y.L. SCH. L. REV. 991, 994-98 (2006-2007). Current offerings include *International Human Rights and Mental Disability Law*; *Lawyering Skills in the Representation of Persons with Mental Disabilities* [hereinafter *Lawyering Skills*]; *Mental Health Issues in Jails and Prisons*; *Survey of Mental Disability Law* [hereinafter

school year.<sup>81</sup> This program, directed by Professor Michael L. Perlin, has grown from an initial online course created in 2000 and initially offered only to mental health professionals.<sup>82</sup> The courses include DVDs, readings, on-going threaded online message boards, a weekly moderated online chat room, two live two-day seminars, a graded midterm and a graded final examination.<sup>83</sup> In January 2008, New York Law School plans to launch an online Masters Degree program in mental disability law studies, open to attorneys and mental health professionals.<sup>84</sup>

All of New York Law School's online disability courses are available to Concord Law School students.<sup>85</sup> The Survey course is offered at the law schools of Southern University, McGeorge, Gonzaga University, and Oklahoma City University; the ADA course is offered at Southern University; and the Lawyering Skills course has been approved to be offered at Oklahoma City.<sup>86</sup> In 2002, the Survey course was offered in Nicaragua.<sup>87</sup> Two of the online courses (the Survey and the ADA courses) have been offered in Japan, and a third (the Lawyering Skills course) will be offered there during the summer 2007 term.<sup>88</sup>

In summer 2005, Professor Ellen S. Podgor taught a pilot web-based

*Survey*]; and *The Americans with Disabilities Act: Law, Policy and Practice* [hereinafter *ADA*]. See *id.* at 994–96 nn.22, 25, 26 and accompanying text.

81. See Perlin, *supra* note 30, at 444 n.42. The courses to be added include *Sex Offenders; Forensic Reports and Forensic Evidence; Mental Illness, Dangerousness, the Police Power and Risk Assessment; and Competency and the Civil Law: Guardianships, Trusts & Estates, Wills, Contracts, and Domestic Relations*. See *id.*; e-mail message from Michael Perlin, Professor of Law, New York Law School, to author (Jan. 9, 2007) (on file with author).

82. See Victoria Rivkin, *Videotape and Internet Bring the Classroom Home*, N.Y.L.J., Sept. 29, 2000, at 1.

83. See Perlin, *supra* note 30, at 444–45 & nn.43–46; Perlin, *supra* note 80, at 996–97. See also Rivkin, *supra* note 82.

84. See Perlin, *supra* note 30, at 444 n.42; Perlin, *supra* note 80, at 999–1000.

85. See e-mail messages from New York Law School Professor Michael Perlin to author (Feb. 21, 2007 and Oct. 15, 2006) (on file with author). For discussion of Concord Law School, see *infra* notes 103–07 and accompanying text.

86. See Perlin, *supra* note 80, at 999 & n.57.

87. See Perlin, *supra* note 30, at 451–53 & nn.74–78; Perlin, *supra* note 80, at 999 & n.59.

88. See Perlin, *supra* note 80, at 999.

When one of Professor Perlin's online courses is offered at another school, a professor at the other school writes the examination and grades it, although that professor generally draws on Professor Perlin's examination bank. The other law school does not compensate Professor Perlin but signs a licensing agreement with New York Law School. See e-mail message from Professor Michael Perlin to author (Feb. 12, 2007) (on file with author).

course in international criminal law at Georgia State University College of Law to ten law students from various law schools. At the time of Hurricane Katrina, she was visiting at Stetson University College of Law. After Hurricane Katrina, Georgia State and Stetson, as a joint venture, offered the Web course to twenty-two students from Loyola-New Orleans. A post-course survey showed that the students reacted positively to the course. Most would be willing to take another distance learning course again.<sup>89</sup>

Using a combination of live classes and online discussion/postings, Professor Paula Berg has offered a course in public health law to both public health and law students.<sup>90</sup> Professor Berg used the course to evaluate distance learning's ability to "(1) facilitate teaching at different levels to students from two disciplines; (2) enhance interdisciplinary interaction and collaboration; and (3) reduce the barriers associated with time and place constraints."<sup>91</sup>

In fall 2006, while at Hastings College of the Law in San Francisco, Professor Geoffrey Hazard used video teleconference equipment to teach a course in "Special Problems in Federal Procedure" to eight students at the University of Pennsylvania Law School.<sup>92</sup> The course could accommodate as many as fifteen students.<sup>93</sup>

In summer 1998, Harvard Law School Professor Arthur Miller videotaped eleven lectures for a civil procedure course at Concord Law School. Harvard University claimed that the videotaping violated university rules. Subsequently, Harvard Law School amended its faculty manual to provide that any faculty member who wishes to serve as a teacher, researcher, or salaried consultant to an internet-based "university" must first obtain permission from the law school dean followed by a vote by the board that governs the university.<sup>94</sup>

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89. See Ellen S. Podgor, *One Response to Katrina: Distance Learning*, NAT'L L. J., Mar. 27, 2006, at 23.

90. See Berg, *supra* note 69, at 36.

91. *Id.* (footnote omitted).

92. See e-mail message from Geoffrey Hazard, Professor of Law, Univ. of California, Hastings College of the Law, to author (Oct. 17, 2006) (on file with author).

93. See *id.*

For a discussion of other examples of the use of teleconferencing in American legal education, see Johnson, *supra* note 8, at 96–98 (calling teleconferencing "time dependent/place-independent classes" or "extended classroom learning"). See also Helen Leskovic, *Distance Learning in Legal Education: Implications of Frame Relay Videoconferencing*, 8 ALB. L.J. SCI. & TECH. 305 (1998). For a general discussion of video teleconferencing, see Van Dusen, *supra* note 25, at 107–08. For a general discussion of teleconferencing by video and other means, see MOORE & KEARSLEY, *supra* note 12, at 82–86, 145–49.

94. See Amy Docker Marcus, *Seeing Crimson: Why Harvard Law Wants to Rein in One of Its Star Professors*, WALL ST. J., Nov. 22, 1999, at 1. For additional discussion of the dispute between Harvard and Professor Arthur Miller, see Oliphant, *supra* note 42, at

Although not for credit, the Berkman Center for Internet & Society at Harvard University offers several free courses to the public over the internet, on such subjects as "Privacy in Cyberspace" and "Intellectual Property in Cyberspace."<sup>95</sup> American University's Washington College of Law is making available some of its class lectures for downloading to iPods but only for students at the law school.<sup>96</sup>

Washburn University Law School in Kansas and Shepard Broad Law School (Nova Southeastern University) in Florida have jointly offered a seminar conducted simultaneously at both schools.<sup>97</sup> The course involved one week of live classes in Kansas broadcast by television to Florida, followed by a week of live classes in Florida broadcast by television to Kansas, with this cycle repeated throughout the semester.<sup>98</sup>

In 1982, as a supplement to the regular classroom, Minnesota and Harvard Law Schools started the Center for Computer-Assisted Legal Instruction to create computer-assisted legal instruction exercises.<sup>99</sup> Almost all American law schools now participate in the program, which has numerous lessons in many different subjects.<sup>100</sup> In 2004, the Center

848–50; *Sovereignty*, *supra* note 46, at 206–07, 252; *Copyright Ownership*, *supra* note 46, at 190, 191.

95. See Johnson, *supra* note 8, at 100.

For a description of "online teaching modules" (on such topics as Legal Reasoning and on American Legal Theory) developed by some Harvard Law professors for incorporation into law school courses, see *id.*

96. See April Fehling, *Podcasting the Professor*, *LEGAL TIMES*, Sept. 4, 2006, at 34.

97. See Charlene L. Smith, *Distance Education: A Value-Added Model*, 12 *ALB. L.J. SCI. & TECH.* 177, 178, 180 (2001).

98. See *id.* at 180.

99. See Johnson, *supra* note 8, at 89.

100. See *id.* at 89–90. For additional discussion of these exercises, see *id.* at 93; Lasso, *supra* note 12, at 46; Computer-Assisted Learning Institute Home Page, <http://www.cali.org>.

For a collection of articles on computer-assisted legal instruction, see RUSSELL BURRIS, ROBERT E. KEETON, CAROLYN P. LANDIS & ROGER PARK, *TEACHING LAW WITH COMPUTERS: A COLLECTION OF ESSAYS* (1979). For additional discussion of computer-assisted instruction at law schools, see Ashley, *supra* note 8, at 546–47, 560–61, 567–68, 570–78 (including a description of CATO, a computerized tutoring system to teach first-year law students some basic skills of making arguments with cases). For an article on the great potential for computer-assisted law instruction and a description of some of the activities involving computer-aided instruction at Harvard Law School, see Clark, *supra* note 50 (including a bibliographical appendix). For another article on the considerable potential of computer-assisted legal instruction and a description of a Cornell Law School experiment in teaching the law regulating corporate dividends, see Harry G. Henn & Robert C. Platt, *Computer-Assisted Law Instruction: Clinical Education's Bionic*

created the "Consortium for Distance Education from CALI" to encourage the effective use of distance learning technologies in legal education.<sup>101</sup> The Southeastern Association of Law Schools (SEALS) also has a distance learning project that may create a distance-course sharing network.<sup>102</sup>

One law school, Concord Law School in California, offers its courses entirely online, with no brick and mortar classroom instruction and no classes at a particular time and place.<sup>103</sup> Concord uses a combination of televised lectures, professors and instructors who grade essays and examinations, synchronous chat rooms led by a professor, computerized multiple-choice quizzes, final examinations with multiple-choice and essay questions, and a digital library of various internet databases.<sup>104</sup> Although Concord Law School is not accredited by the American Bar Association,<sup>105</sup> the State Bar of California permits Concord graduates to seek admission by taking the bar examination.<sup>106</sup> Because of the rules of the State Bar of California, however, even Concord Law School does not offer the option of purchasing only credentialing (examinations and degree), without paying for instruction.<sup>107</sup>

Some universities in Europe offer distance-learning external degrees in law.<sup>108</sup> One commentator, however, has argued that Europe may be more receptive to external law degrees because the lecture is the primary teaching method and because the law degree there is not a professional degree, without much attention to teaching professional skills and with many law degree recipients not practicing law.<sup>109</sup>

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*Sibling*, 28 J. LEGAL EDUC. 423 (1977). The student response to the Cornell experiment was enthusiastic. *See id.* at 434–36.

101. *See* Powell, *supra* note 73.

102. *See id.*; <http://www.nsulaw.nova.edu/seals/Distancelearning.htm>.

103. *See* Neil, *supra* note 69, at 14. For additional discussion of Concord Law School, see Currier, *supra* note 69; Gleason, *supra* note 75; Johnson, *supra* note 8, at 90, 99 (calling this "time-independent/place-independent" or "classroom-free learning"); Oliphant, *supra* note 42, at 851–68; Andrew S. Rosen, *Concord University School of Law's On-Line Law Degree Program*, 15 ST. JOHN'S J. LEGAL COMMENT. 311 (2001); Concord Law School Home Page, <http://www.concordlawschool.edu>.

104. *See* Oliphant, *supra* note 42, at 851–66.

105. *See* [www.concordlawschool.edu/school-accreditation.html](http://www.concordlawschool.edu/school-accreditation.html).

106. *See id.*; Neil, *supra* note 69, at 14.

107. *See* e-mail message from Barry Currier, Dean, Concord Law School, to William Wang (Dec. 20, 2006). *See also* Concord Law School Home Page, <http://www.concordlawschool.edu>.

108. *See* Johnson, *supra* note 8, at 91–92.

109. *See id.*

In the People's Republic of China, some law degrees are available through passing examinations without attending law school. The students prepare for the examinations through self-study, distance learning, or the internet. The law degree entitles holders to

Outside the context of legal education, several American universities have established distance-learning external degree programs. The Western Governors Association has created the Western Governors University, through which students may take some courses and receive certain degrees online.<sup>110</sup> A private university, the University of Phoenix, also offers online courses to thousands of students.<sup>111</sup> Although not an external-

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take the Chinese bar exam and then practice law. See Zhenmin Wang, *Legal Education in Contemporary China*, 36 INT'L LAW. 1203, 1206 & nn.20–21 (2002) (citing, inter alia, <http://www.selfstudy.com.cn>).

110. For discussion of the Western Governors University, see Johnson, *supra* note 8, at 90–91; Western Governors University Home Page, <http://www.wgu.edu>. For discussion of the Western Governors Association, see Western Governors Association Home Page, <http://www.westgov.org>. For discussion of the Western Governors University, Empire State College, Thomas Edison State College, and other universities with similar distance learning programs, see MOORE & KEARSLEY, *supra* note 12, at 51–56.

111. See Johnson, *supra* note 8, at 91. For additional information about University of Phoenix, see [http://www.phoenix.edu/about\\_us/about\\_us.aspx](http://www.phoenix.edu/about_us/about_us.aspx). For a discussion of turmoil at the University of Phoenix and criticisms of its recruitment tactics and its academic quality, see Sam Dillon, *Troubles Grow For a University Built on Profits*, N.Y. TIMES, Feb. 11, 2007, § 1, at 1.

For a discussion of the Western Governors University, the University of Phoenix, Jones International University (a for-profit accredited degree-granting completely online university), and other similar online institutions of higher education, see MOORE & KEARSLEY, *supra* note 12, at 51–56, 59–62; Lieberwitz, *supra* note 45, at 104–06. For a description of other distance learning programs created by existing brick and mortar universities, including Universitas 21 (created by a consortium of universities), see *id.* at 104–07. For additional description of Universitas 21, see Universitas 21 Home Page, <http://www.u21global.com>. For a brief description of Western Governors University, the University of Phoenix, Regents College (a virtual university), plus the State University of New York's Learning Network (an online instructional program), see Oliphant, *supra* note 42, at 878. For a discussion of both Western Governors University and the University of Phoenix, see Paulson, *supra* note 13, at 123–24, 128–31. See generally HALL, *supra* note 25 (discussing distance education and the open university; the author was the president of Empire State College, an “open university” created in 1971 by the State University of New York; *id.* at xi); Distance Education Clearinghouse Home Page, <http://www.uwex.edu/disted>.

During the twelve-month 2000–2001 academic year, 56% (2,320) of all two-year and four-year Title IV-eligible, degree-granting institutions offered some distance education courses. National Center for Education Statistics, *Distance Education at Degree-Granting Postsecondary Institutions: 2000–2001*, <http://nces.ed.gov/surveys/peqis/publications/2003017> (also discussing additional statistics for the period 2000–2001). For discussion of the statistics in this study and the dramatic growth in distance education courses at colleges and universities, see *Desperate*, *supra* note 31, at 96–97; *id.* at 97 (estimating that five billion dollars will be spent on online learning in 2006); *Sovereignty*, *supra* note 46, at 201–03; *Copyright Ownership*, *supra* note 46, at 146.

degree program, the Massachusetts Institute of Technology's OpenCourseWare Project eventually hopes to publish online (free without restriction for noncommercial use) the syllabi, lecture notes, problem sets and solutions, examinations, and reading lists for all two thousand courses at the university. Faculty involvement is voluntary.<sup>112</sup> Below is a February 6, 2008 excerpt from the project's website:

Today, MIT OCW is a large-scale, Web-based publication of the educational materials from the MIT faculty's courses. This unique initiative enables the open sharing of the MIT faculty's teaching materials with educators, enrolled students, and self-learners around the world. MIT OCW provides users with open access to the syllabi, lecture notes, course calendars, problem sets and solutions, exams, reading lists, even a selection of video lectures, from 1550 MIT courses representing 34 departments and all five of MIT's schools. The initiative will include materials from virtually all courses by the year 2008.<sup>113</sup>

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For additional discussion of online courses and programs in higher education, see *Desperate*, *supra* note 31, at 96–97; *Sovereignty*, *supra* note 46, at 203–05; *Copyright Ownership*, *supra* note 46, at 147–49. For discussion of three converging economic developments in the late 1990s that resulted in the explosion in distance education in higher education generally, see Gleason, *supra* note 75.

Nevertheless, many of the e-learning start-up companies launched during the internet boom of the 1990s have scaled back or disappeared altogether. See Katie Hafner, *Lessons Learned at Dot-Com U.: In the Rush to Turn Online Education into a Business, the Roof Caved In. From the Ruins, Some Try to Rebuild*, N.Y. TIMES, May 2, 2002, at E1. For additional description of the financial difficulties encountered by the for-profit online programs of some universities, see Lieberwitz, *supra* note 45, at 116–18.

112. See *Copyright Ownership*, *supra* note 46, at 149.

113. <http://www.ocw.cn/OcwWeb/Global/AboutOCW/our-story.htm>. For additional discussion of MIT's OpenCourseWare project, see Anne Marie Chaker, *Yale on \$0 a Day: Top Universities Post Lectures and Other Course Materials on Web, Free and Open to All; Literature of Crisis on Your iPod*, WALL ST. J., Feb. 15, 2007, at D1.

Other colleges and universities are beginning to offer online materials for a few of their courses. See *id.* Many of these schools receive support from the William and Flora Hewlett Foundation, which as of February 2007 had given over \$68 million to universities and nonprofits to post free online materials. See *id.* at D6.

At the MIT OpenCourseWare project, all of the lectures for Professor Walter Lewin's Physics I, II, and III courses are available on video. Professor Lewin gets e-mail messages about the courses every day from the general public and tries to answer all of them. Some of the e-mails of appreciation about how viewers grow to love physics make him cry. See *id.* at D6.

For a description of a University of California, Berkeley physics course available throughout the world through Google, see Rick DeVecchio, *World Listens in Online When Cal Professor Teaches Physics*, S.F. CHRON., Nov. 6, 2006, at B1. In November 2006, Google distributed roughly 250 hours of university-produced material, including the lectures for six courses. See *id.*

The next step would be for an institution to offer examinations, credit, and a degree based on the material available through the MIT OpenCourseWare project. That institution might be MIT or some other institution working with MIT's cooperation. Other colleges could also grant credit based on the examinations.

Similarly, if, say, Harvard Law School were to mimic MIT's OpenCourseWare project, other law schools might offer examinations based on Harvard's online material (after obtaining Harvard's permission). The ABA allows up to twelve hours of distance education credit (provided that the students have ample interaction with the instructor and other students, and the course includes ample monitoring of student effort and accomplishment).<sup>114</sup> The Harvard online material might also help individuals decide whether to attend law school.

An interesting question is what would happen if individual students or student associations at Harvard Law School were to post on blogs almost verbatim transcripts of Harvard Law School courses typed by students on their notebook computers while attending class.<sup>115</sup> Would students at other law schools rely in part on this online Harvard material? These students may be reluctant to do so because their tests would not be based on the Harvard classes.

#### *G. Task Force and Commission Recommendations About Higher Education Generally*

External degree programs have received the encouragement of several groups that have studied contemporary higher education. The Carnegie Commission on Higher Education has recommended "that state and federal government agencies, as well as private foundations, expand programs of support for the development of external degree systems and open universities."<sup>116</sup> and has urged "the development and utilization of

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For a description of universities and colleges that offer some courses online free (including MIT, Notre Dame, Yale, Tufts, Stanford, and the University of California, Berkeley), see Chaker, *supra*.

114. See *supra* notes 69-72 and accompanying text. For discussion of the American Bar Association restrictions on the use of distance education, see *supra* notes 65-68 and accompanying text.

115. SwapNotes is a new free online service that allows American and Canadian law students and law professors to share notes, outlines, and old exams. The address of the website is [www.swapnotes.com](http://www.swapnotes.com).

116. CARNEGIE COMMISSION ON HIGHER EDUCATION, NEW STUDENTS AND NEW PLACES: POLICIES FOR THE FUTURE GROWTH AND DEVELOPMENT OF AMERICAN HIGHER



outstanding instructional programs and materials for use with new educational hardware.”<sup>117</sup>

The Commission on Non-Traditional Study has made similar recommendations:

Degrees should sometimes be awarded wholly by examination if two conditions are met: the institution concerned is an established and reputable educational authority; and valid and reliable examinations are available to test the attainment of the degree’s objectives.

... In exceptional cases, under conditions which are carefully controlled by quality standards, degrees should be awarded by nonteaching institutions. . . .<sup>118</sup>

In 1977, a task force of the American Council on Education examined the area of credentialing educational accomplishment. Although the task force believed that credentialing should be done by traditional universities and colleges,<sup>119</sup> it did advocate that these institutions should “permit students to demonstrate accomplishment without reference to time-bound and campus-bound instruction and learning.”<sup>120</sup> The task force also urged faculties to formulate “policy for accepting the results of nationally validated examinations or other procedures for establishing credit equivalencies.”<sup>121</sup>

In 2006, the Secretary of Education’s Commission on the Future of Higher Education called for “a system that is accessible to all Americans, throughout their lives”<sup>122</sup> and asked “postsecondary institutions to adapt to a world altered by technology, changing demographics and globalization, in which the higher-education landscape includes new providers and new paradigms, from for-profit universities to distance learning.”<sup>123</sup> The

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EDUCATION 117 (1971). Similar recommendations are made in the following studies: CARNEGIE COMMISSION ON HIGHER EDUCATION, LESS TIME, MORE OPTIONS: EDUCATION BEYOND THE HIGH SCHOOL 20 (1971); CARNEGIE COMMISSION ON HIGHER EDUCATION, THE FOURTH REVOLUTION: INSTRUCTIONAL TECHNOLOGY IN HIGHER EDUCATION 51–53, 91–94 (1972) [hereinafter *THE FOURTH REVOLUTION*].

117. *THE FOURTH REVOLUTION*, *supra* note 116, at 48.

118. SAMUEL B. GOULD, DIVERSITY BY DESIGN: COMMISSION ON NON-TRADITIONAL STUDY 131–33 (1973). The Commission on Non-Traditional Study was created in 1971 by the Carnegie Corporation, the College Entrance Examination Board, and the Educational Testing Service.

119. See TASK FORCE ON EDUCATIONAL CREDIT AND CREDENTIALS, AMERICAN COUNCIL ON EDUCATION, RECOMMENDATIONS ON CREDENTIALING EDUCATIONAL ACCOMPLISHMENT 6–9 (1978).

120. *Id.* at 16.

121. *Id.* at 18.

122. THE SECRETARY OF EDUCATION’S COMMISSION ON THE FUTURE OF HIGHER EDUCATION, A TEST OF LEADERSHIP: CHARTING THE FUTURE OF U.S. HIGHER EDUCATION xi (U.S. Dept. of Education 2006).

123. *Id.*

report complained that American higher education “has yet to successfully confront the impact of . . . rapidly evolving technologies . . . and an evolving marketplace characterized by new needs and new paradigms. History is littered with examples of industries that, at their peril, failed to respond to—or even to notice—changes in the world around them, from railroads to steel manufacturers.”<sup>124</sup> The Commission urged “[s]tate and federal policy-makers . . . [to support] the spread of technology that can lower costs”<sup>125</sup> and warned that “[t]oo many of our colleges and universities have not embraced opportunities to be entrepreneurial.”<sup>126</sup> In addition, the report noted “that the results of scholarly research on teaching and learning are rarely translated into practice”<sup>127</sup> and that “[a]ccreditation and federal and state regulations, while designed to assure quality in higher education, can sometimes impede innovation.”<sup>128</sup>

The Commission praised Carol Twigg and the National Center for Academic Transformation at the Rensselaer Polytechnic Institute, which worked with thirty universities and colleges from 1999–2004

to enhance quality of instruction, improve student learning and reduce costs through the use of technology and innovative pedagogy. . . . These redesigned [large, introductory, formerly lecture] courses provided online access to Web-based tutorials, on-demand feedback, and support from student peer mentors. The use of technology reduced course preparation time for instructors and lowered instructional costs per student. . . .

Institutions reported an average of 37 percent reduced cost and an increase in student engagement and learning. For example, scores in a redesigned biology course at the University of Massachusetts increased by 20 percent, while the cost to the university per student dropped by nearly 40 percent.<sup>129</sup>

In 1971, a task force concerned with higher education and commissioned by the Department of Health, Education, and Welfare recommended unbundling of college education:

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124. *Id.* at xii.

125. *Id.* at 2.

126. *Id.* at 4.

127. *Id.* at 15.

128. *Id.* at 16.

129. *Id.* at 21. For additional discussion of Carol Twigg’s work at the National Center for Academic Transformation at the Rensselaer Polytechnic Institute, see Carol A. Twigg, *Improving Learning and Reducing Costs: New Models for Online Learning*, EDUCAUSE REV., Sept./Oct. 2003, at 28, available at <http://www.educause.edu/ir/library/pdf/erm0352.pdf>.

We believe it is time for a different approach to making higher education more available and more stimulating to those people unable to attend a college full-time. . . . We propose that the resources for education provided as a package by the college (formal instruction, reading, libraries, examinations, degrees, etc.) be provided to the community as separate services in order that individuals and groups can find their own way to an education.

We believe that there are literally millions who can benefit from new approaches to an education. . . .

If separate organizations are established that provide the traditional functions of the college directly to the community, individuals can fashion and legitimize their own programs . . . .

While at first glance the functions of a college seem inseparable, closer examination would indicate that their separation is not only possible, but would have advantages.<sup>130</sup>

The foregoing recommendations indicate a recognition of the advantages of unbundling. As with undergraduate education, changes are needed in the existing law school system to make legal education available to students of modest economic means.

#### IV. CONCLUSION

Currently, law schools tie together five quite distinct services: (1) impartation of knowledge, (2) counseling/placement, (3) credentialing, (4) coercion, and (5) club membership. Students do not have the opportunity to pay for just the services they want or to buy each of the five services from different providers.

Unbundling of legal education along functional lines would substantially increase student options and dramatically increase competition and innovation by service providers. This offers the hope of making available more individualized and better instruction and giving students remarkable freedom of choice as to courses, schedules, work-pace, instructional media, place of residence, and site of learning. Most importantly, this improved education would be available on an "open admissions" basis at much lower cost to many more individuals throughout the nation, or even the world.

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130. FRANK NEWMAN, REPORT ON HIGHER EDUCATION 68–69 (Washington, D.C.: U.S. Dept. of Health, Education, and Welfare, 1971).

For general discussion of distance education, see TEACHING AND LEARNING AT A DISTANCE (Thomas E. Cyr ed., 1997); HALL, *supra* note 25; MOORE & KEARSLEY, *supra* note 12; SIMONSON, SMALDINO, ALBRIGHT & ZVACEK, *supra* note 12; TECHNOLOGY: TAKING THE DISTANCE OUT OF LEARNING (Margit Misangyi Watts ed., 2003); ASSESSMENT STRATEGIES FOR THE ON-LINE CLASS: FROM THEORY TO PRACTICE (Renee F. Weiss, John F. Bauer & Bruce W. Speck eds., 2002); PRINCIPLES OF EFFECTIVE TEACHING IN THE ONLINE CLASSROOM (Renee F. Weiss, Dave S. Knowlton & Bruce W. Speck eds., 2000). For a long list of sources of information on distance education, see MOORE & KEARSLEY, *supra* note 12, at 307–21.

The main theme of this article is the advantage of unbundling. A more modest sub-theme is the benefit of use of technology and distance learning, both of which are already increasingly used by law schools. Bar associations and traditional law schools will undoubtedly resist change. Nevertheless, there is pressure on American society to provide a law school education to more of those who want it, while at the same time the financial cost to society of providing a law school education is rising dramatically. These pressures may result in at least a partial unbundling of American legal education.

